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NOTES ON IOWA REPORTS

Being Chronological Annotations

OF

the decisions of the Iowa Supreme Court showing their Present Authoritative Value as evinced by all subsequent citations by that court thereon, with parallel references to Northwestern Reporter, American Decisions, American Reports, American State Reports, American and English Annotated Cases, and Lawyers' Reports Annotated (both series)

TOGETHER WITH

Full Parenthetical notes of other Iowa cases relating thereto, and cross references to similar and analogous ones annotated, and to decisions from foreign tribunals

BY

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NOTES

ON

IOWA REPORTS

VOLUME THREE

Annotations to Decisions Reported in Volume 22 Iowa

PURSLEY *v.* HAYES, 22 IOWA 11, 92 AM. DEC. 350

(Case Arising out of the same facts, 24 Iowa 118, 92 Am. Dec. 460.)

1. **Husband and Wife—Conveyance by Husband of Wife's Land—Subsequent Signing, Acknowledging and Delivering of Deed by the Wife.**—Where a husband signs and receives the consideration for a deed to a wife's land, with her knowledge and consent, and after his death the wife signs, acknowledges and delivers the deed, it not having been delivered to the grantee until then, such conveyance is valid, pp. 15-17.

Reaffirmed in Deford *v.* Mercer, 24 Iowa 124, 125, 92 Am. Dec. 460, holding, also, that a mistake in the description of the realty conveyed in such a deed may be corrected in equity.

2. **Guardian and Ward—Guardian's Sale of Ward's Land—Action to Set Aside—Limitation of Action—Statute Construed—Unauthorized and Void Sale.**—The statute of limitation—Sec. 1508 of the Code of 1851, and Sec. 2560 of the Code of 1860—forbidding an action to be maintained to question a guardian's sale of real estate after five years from the date thereof, has no reference to appeals, writs of error, or other process bringing the matter to a higher court for review; nor does such limitation apply to an action to set aside such a sale under an order made by the county court without jurisdiction, or without notice to the parties in interest, nor to a sale made by a person who has no authority whatever; such sales being void *ab initio*, pp. 24-26.

Reaffirmed and extended in Good v. Norley, 28 Iowa 192-196, 201-203, (cited in dissenting opinion, 216, 217), holding further that probate proceedings to sell real estate of a decedent, where the heirs and persons having an interest therein are not served with notice, are void *ab initio*: Holding, also, that the appointment of a guardian *ad litem* for a minor heir in such case and his defense for such minor, is of no effect.

Reaffirmed and qualified in Deford v. Mercer, 24 Iowa 120, 122, 123, 92 Am. Dec. 460, holding, however, that where a party, with full knowledge of all the facts, there being no fraud or mistake, and nothing to repel the presumption that he knew his legal rights, but much to show that he did fully know them, voluntarily accepts and retains the purchase money arising from the sale of his land, he cannot afterward claim the land itself.

Reaffirmed and qualified in Washburn v. Carmichael, 32 Iowa 479, 480, holding—as does the present case in argument—that continuous possession of the lands by a purchaser at any of the void sales set out in the text, for more than five years, bars an action by an heir, or ward for its recovery.

Cited in Shawhan v. Loffer, 24 Iowa 231, the case turning upon other questions.

Cross references. See Rule 3 hereof. See further on this question and in its connection, annotations and cross references under Allen v. Saylor (14 Iowa 435), Vol. II. p. 262.

3. Judgments—Collateral Attack—When not Allowed—Inferior Courts—Presumption of Regularity of Proceedings in.—Where a court rendering a judgment or decree has jurisdiction of the subject-matter and of the parties to the action or proceeding, such judgment or decree and the proceedings thereunder, are not subject to collateral attack for irregularities or defects in the proceedings in the action, or under the judgment or decree, not rendering them void absolutely.

If the jurisdiction of an inferior court once attaches, the presumption is in favor of the validity of all of its subsequent proceedings; and mere irregularities or defects will not avail to assail them collaterally, pp. 28, 29, 33, 34.

Reaffirmed in Shawhan v. Loffer, 24 Iowa 227; Read v. Howe, 39 Iowa 560; Tharp v. Brenneman, 41 Iowa 254; Myers v. Davis, 47 Iowa 330; Lees v. Wetmore, 58 Iowa 178, 12 N. W. 241; Baker v. Jamison, 73 Iowa 701, 36 N. W. 649; Metropolitan Nat'l Bank v. Commercial State Bank, 104 Iowa 686, 74 N. W. 27, all holding—as does the present case—that where a court has jurisdiction of the subject-matter, errors in its decisions upon the sufficiency of original notice, or of service thereof, or any other rulings in the action or proceeding, will not be available upon collateral attack.

Reaffirmed and explained in Bacon v. Chase, 83 Iowa 527, 50

N. W. 25, holding that if an inferior court has jurisdiction of the subject-matter, and parties, its proceedings will, upon collateral attack, be conclusively presumed to have been legally done.

Reaffirmed and explained in In re Appeal of Head, 141 Iowa 665, 118 N. W. 890, holding that in support of a judgment or decree it is presumed that notice essential to the validity of the court's action was given, and that process was regularly and properly served or appearance made; and that this presumption obtains by reason of Sec. 4648 of the Code of 1897, to the proceedings of inferior courts and tribunals.

Distinguished in Cowin v. Toole, 31 Iowa 516, holding that the proceedings of an inferior court may be attacked for fraud, as those of any other court.

Distinguished and narrowed in Brown v. Davis, 59 Iowa 644, 645, 13 N. W. 862, holding that where a justice enters judgment on a promissory note in excess of his jurisdiction as given by statute, and without the assent of the defendant, maker of the note, it is a nullity: That consent given in such a note for the justice to so render judgment thereon, does not confer jurisdiction.

Unreported citation, 48 N. W. 730.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others on the question, see annotations under Boker v. Chapline (12 Iowa 204), Vol. II. p. 33.

Cross references. See further on this question, annotations under Rule 2 of Bonsall v. Isett (14 Iowa 309); Rule 2 of Long v. Burnett (13 Iowa 28), Vol. II, pp. 242 and 113, respectively.

4. Conveyances—Sufficiency of Description in of Realty Conveyed—Reference to Plat or Survey to Identify—Extraneous Proof.—A conveyance of land will not be void for uncertainty in its description, when the description therein, when taken in connection with a plat or survey leaves the identity thereof beyond doubt: And extraneous and even parol evidence is admissible to apply the instrument to the subject-matter, pp. 39, 40.

Reaffirmed and extended in Ottumwa, Cedar Falls & St. P. Ry. Co. v. McWilliams et al, 71 Iowa 167, 168, 32 N. W. 317, holding further that even though a description in a conveyance is so vague as to be void for uncertainty, still the defect is cured by the grantor putting the grantee into possession of the land intended to be conveyed.

Reaffirmed and varied in Albia State Bank v. Smith, 141 Iowa 261, 119 N. W. 610, holding that where a description in a recorded mortgage on land is such as to point out the tract intended to be mortgaged by application to the existing facts and conditions which are ascertainable upon reasonable inquiry, it is sufficient to constitute constructive notice of the mortgage on such land.

BONDURANT v. CRAWFORD, 22 IOWA 40

1. Contract—False and Fraudulent Representations—Equal Opportunity to Detect Falsehood, when no Defense.—Where false representations inducing a contract relate to a matter of fact, it is not an invariable rule that there can be no fraud, if the other party had an opportunity or convenient opportunity to detect the falsehood.

Thus, a man cannot escape liability for false and fraudulent representations that he owns a parcel of land, because the party dealing with him had "convenient opportunity" to examine the record: Nor can he evade positive and willful misrepresentations as to the quality of land because the other party had an opportunity to go a distance of five or five hundred miles, and examine the character thereof for himself, p. 47.

Reaffirmed and explained in Holmes v. Rivers, 145 Iowa 709, 124 N. W. 803, holding that where the facts are peculiarly within the alleged wrong doer's knowledge, he may not urge as a defense that the complaining party did not resort to the means available for the detection of their falsity, or was negligent in failing to examine the public records for that purpose.

Reaffirmed and extended in Hale v. Philbrick, 42 Iowa 84, holding that where a person sells goods, the buyer may rely upon the seller's representations that he owns them, and is not required to make inquiry as to the extent of the seller's property in the things sold.

(Note.—See further, sustaining and explaining, but not citing, the text, Howerton v. Augustine, 145 Iowa 246, 121 N. W. 373; Riley v. Bell, 120 Iowa 618, 95 N. W. 170; Gardner v. Prenary, 65 Iowa 646, 22 N. W. 910; Carmichael v. Vandebur, 50 Iowa 651.—Ed.)

Cross references. See Rule 2 hereof. See further on this question, annotations under Rule 1 of Gates v. Reynolds (13 Iowa 1), Vol. II, p. 107; Rules 1 & 2 of Holmes v. Clark (10 Iowa 423), Vol. I, p. 719. See, also, in this connection, Zang v. Adams, 58 Am. St. Rep. 249; Cook v. Bowman, 47 Am. St. Rep. 691; Fargo Gas & Coke Co. v. Fargo Gas & Electric Light Co., 37 L. R. A. 593; and see 20 Cyc. 32.

2. Contracts—False and Fraudulent Representations—Opinions as to value, or Future Happenings, not.—Opinions as to the value of a thing sold or contracted for or in relation to, and as to something which will occur in the future, do not constitute fraud or false representations, p. 47.

Reaffirmed in McClanahan v. McKinley, 52 Iowa 223, 2 N. W. 1101; Robinson & Co. v. Larson, 112 Iowa 176, 83 N. W. 901; Garrett v. Slavens, 129 Iowa 110, 105 N. W. 369, all holding that expressions of opinions, and statements as to something to happen or to be done in the future, do not constitute false representations, or fraud.

(Note.—There are many other cases sustaining and explaining, but not citing the text.—Ed.)

3. Contracts—False and Fraudulent Representations—Action for Damages for—Knowledge of Falsity by Defendant to be Alleged and Proved.—In an action at law to recover damages by reason of the defendant's false and fraudulent representations inducing plaintiff to enter into a contract, or make a sale or purchase of property, the plaintiff must allege and prove that the defendant knew his representations were false at the time he made them, or a state of facts from which the law will infer a willful misstatement, pp. 47, 48.

Reaffirmed and extended in King v. Ordway, 73 Iowa 741, 36 N. W. 768, holding further that where a person in order to obtain a conveyance to land assumes to state a fact, knowing that his assertions are untrue at the time he makes them, he is thereby chargeable with fraud.

Special cross reference. For further cases citing the text, and many others sustaining, explaining and qualifying it, see annotations under Rules 1 & 2 of Holmes v. Clark (10 Iowa 423), Vol. I, p. 719.

Cross references. See rules 1 & 2 hereof, and cross references there found, in this connection.

4. Appeal—Erroneous Instructions Given by Trial Court—When not Ground for Reversal—Harmless Error.—Although the trial court errs in giving certain instructions asked by a party, still such rulings or error will not be ground for reversal upon appeal, when it appears thereon that the issue was plainly submitted to the jury, and that they reached a correct conclusion under the testimony, pp. 46, 48

Reaffirmed and explained in Hunt v. Ch. & N. W. R. R. Co., 26 Iowa 366; First Nat'l Bank of Ft. Dodge v. Breese, Whitlock & Co., 39 Iowa 645, holding that the giving of an erroneous instruction, which, under the testimony, could work no prejudice to the party complaining, will not be regarded as reversible error.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

McNALLY v. SHORE, 22 IOWA 49

1. Appeal—Erroneous Instruction Given Below—When not Ground for Reversal—Harmless Error.—Even though an instruction given on the trial below is erroneous, still such error and instruction will not be ground for reversal upon appeal, when it appears from the record thereon that the party appealing and complaining was not thereby prejudiced in his substantial rights, pp. 50, 51.

Special Cross reference. For cases citing and sustaining the text, see Rule 4 of Bondurant v. Crawford (22 Iowa 40), next preceding this present case.

HUNT v. ROWLAND, 22 IOWA 53

(Later Appeal, 28 Iowa 349.)

1. Vendor and Purchaser—Contract for Sale of Land—Purchaser in Possession to Pay Taxes—Purchaser at Tax Sale by, Effect or Validity.—A purchaser of land in possession thereof under a contract to convey which is silent as to who is to pay the taxes until payment of the purchase price and conveyance by vendor, must pay the taxes after his entry, to such time, and cannot directly or indirectly acquire a title at a sale thereof for such taxes, so as to affect the rights of his vendor, p. 55.

Reaffirmed and explained in Curtis v. Smith, 42 Iowa 671, 672, holding that one in possession of land, but having no interest therein, and who is under no obligation to pay taxes thereon, and not holding as tenant, trustee, or agent of or for the owner, may become a purchaser at a tax sale thereof: And that this rule applies to the grantee of such land under a quit-claim deed which conveys no interest therein, and who holds possession hostile to the land owner.

Reaffirmed in part in Baldwin v. Mayne, 42 Iowa 138, holding that a purchaser of land under an executory contract of sale who enters into possession thereof and enjoys its rents and profits, is bound to pay the taxes thereon accruing after he takes possession, although before a conveyance is executed thereto.

Reaffirmed and extended in Cowdry v. Cuthbert, 71 Iowa 734, 735, 29 N. W. 799, holding further that it is the duty of a purchaser in possession of land under an executory contract of sale, to pay all taxes thereon accruing after he takes possession, but he is not bound to pay taxes for a prior period: That if the land is sold at a tax sale for taxes accruing before he took possession, it is his duty to redeem therefrom upon being served with the statutory notice; and that the amount he pays to so redeem will be applied as a payment on the purchase price: But he cannot acquire such tax title, and hold thereunder adverse to his vendor.

Reaffirmed and qualified in Clinton v. Shugart & Ouren, 126 Iowa 183, 184, 101 N. W. 787, holding that the vendor in a contract to convey land and deliver possession thereof at a future date upon the payment of the purchase price, is liable for the taxes thereon, up to the date of the conveyance and delivery of possession to the purchaser, in the absence of an express agreement to the contrary: That in such cases *possession* of the premises governs the liability for the payment of taxes, in the absence of express contract to the contrary.

And see 148 Iowa 160, 162, not yet published.

Unreported citation, 125 N. W. 339, 340.

Cross reference. See further on this question, annotations under Miller v. Corey, Ad'mr (15 Iowa 166), Vol. II, p. 319.

NEGUS v. YANCEY & SMITH, 22 IOWA 57

(Later Opinion on Rehearing, 23 Iowa 417.)

1. Taxation and Revenue—Power of Legislature to Change or Modify Statutes Concerning—Effect on Taxes Previously Assessed, and on Redemption from Tax Sales Therefor.—The Legislature has power to at all times change or modify the revenue law, and the law as so changed or modified applies to and governs sales for taxes assessed prior to its taking effect, and to the rights of and time for the land owner to redeem therefrom, p. 59.

Reaffirmed and explained in Sully v. Kuehl, 30 Iowa 278, holding that Sec. 762 of the Code of 1860, providing that an error or irregularity in a tax sale shall not affect its validity, applies to a sale for a delinquency existing at the time of its passage.

Reaffirmed and extended in Kaskel v. City of Burlington, 30 Iowa 235, 238, holding further that the Act of 1868, authorizing cities to sell real and personal property for delinquent taxes, operates upon delinquents at the time of its passage, as well as to those delinquent thereafter.

Cited in McCready v. Sexton & Son, 29 Iowa 407, 4 Am. Rep. 214 (dissenting opinion), the case turning on other points.

BURLINGTON UNIVERSITY v. BARRETT, 22 IOWA 60, 92 AM. DEC. 376

1. Written Instruments—When Contract or Deed and When a Will—Rule to Determine Nature of.—If an instrument passes a *present interest*, although the right to its possession and enjoyment may not accrue till some future time, it is a *deed or contract*; but if the instrument does not *pass an interest* or right till the *death of the maker*, it is a *will*, or testamentary paper, p. 72.

Reaffirmed in Craven v. Winter, 38 Iowa 478; Schollmier v. Schoendelen, 78 Iowa 428, 43 N. W. 283, 16 Am. St. Rep. 455; Saunders v. Saunders, 115 Iowa 278, 88 N. W. 330; Tuttle v. Raish, 116 Iowa 334, 335, 90 N. W. 68; Wilson v. Carter, 132 Iowa 444, 109 N. W. 887; Lefebure v. Lefebure, 143 Iowa 296, 121 N. W. 1026.

(Note.—See further, sustaining and explaining, but not citing, the text, Lippold v. Lippold, 112 Iowa 134, 83 N. W. 809, 84 Am. St. Rep. 331; Leaver v. Gauss, 62 Iowa 314, 17 N. W. 522.—Ed.)

Cross reference. See Rule 2 hereof.

2. Written Instruments—Deeds, Wills and Contracts—Construction to Determine Nature of Instrument—What Considered by Court—Intention of Parties.—In determining whether or not an instrument is a contract or deed or is testamentary, the court will not allow the use of language peculiar to either class, nor even the belief of the maker as to its character to inflexibly control his construction

thereof; but will look further, after giving these circumstances due weight, and, after weighing all the language as well as the facts and circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will effectuate the manifest intention of the maker and parties to it, pp. 73, 74.

Reaffirmed in Saunders v. Saunders, 115 Iowa 278, 88 N. W. 330.

Cross references. See Rule 1 hereof, in this connection. See further on this question, annotations and cross reference under Field v. Schricher (14 Iowa 119), Vol. II, p. 214.

COCHRAN v. MCCLEARY, MAYOR, 22 IOWA 75

1. Municipal Corporations—City of Second Class—Mayor Has No Right to Preside Over Council or Vote.—A mayor of a city of the second class organized under the general incorporation act, Chap. 51 of the Code of 1860, has no right by virtue of his office to preside over the council or vote in their deliberations, pp. 80, 81.

Cited in Burdick v. Babcock, 31 Iowa 573, turning upon other questions of municipal corporate powers.

Overruled in Griffin v. Messenger, 114 Iowa 100, 86 N. W. 219, holding that the rule is abrogated by Sec. 531 of the Code of 1873, and that under that Code a mayor of a city of the second class is a member of its council, and is entitled to preside over it, and to vote in case of a tie.

2. Municipal Corporations—Officers—De Facto Alderman—Validity of Acts of.—The acts and votes of a *de facto* alderman are valid; and especially is this the rule in a collateral proceeding, p. 84.

Special Cross reference. For cases citing and sustaining the text, and many others on the question, see annotation under *Ex parte Strahl*, (16 Iowa 369), Vol. II, p. 445.

3. Office and Officer—Franchises—Right to Preside Over City Council—Quo Warranto to Test Right to.—The right to an office or to a franchise is, under Chap. 151 of the Code of 1860, to be tested by *Quo Warranto* proceedings.

The right of the mayor, if any, to preside over the city council is such a franchise and is to be so tested, pp. 87, 89.

Reaffirmed as to first paragraph in State ex rel. Perine v. Van Beek, 87 Iowa 575, 54 N. W. 526, 43 Am. St. Rep. 397, 19 L. R. A. 622, under the Code of 1873.

Reaffirmed and extended in Vette v. Byington, judge, 132 Iowa 489, 109 N. W. 1073, holding further that—under the Code of 1897—equity will not determine the title to an office, and that a court of chancery will not interfere by injunction before a trial at law, in favor of an officer *de jure* against an illegal claimant when the latter is already in possession of the office.

Cited in State ex rel. White v. Barker, 116 Iowa 99, 89 N. W.

205, 93 Am. St. Rep. 222, 57 L. R. A. 244, the court holding that, under Sec. 4316 of the Code of 1897, if the county attorney on demand, neglects or refuses to commence *Quo Warranto* proceedings to test the legality or Constitutionality of an office, or the validity of the appointment of an officer therefor, any citizen having an interest, may commence and prosecute the proceedings.

Distinguished in Sweatt v. Faville, 23 Iowa 328, holding that pending a contest of an election for the removal of a county seat, proceedings under the election, and looking towards its removal, may be enjoined.

Distinguished in State ex rel. Deal v. Alexander, 107 Iowa 180-182, 184, 185, 77 N. W. 843, holding that an ordinance of a city providing for the contest of the election of any city officer on the same ground and for the same causes specified in cases of contested elections of county officers, does not preclude a party from proceeding under Sec. 3345 of the Code of 1873, from testing the right and title to a city office created by the city council under Sec. 524 of that Code and made appointive by the council.

FREMONT COUNTY v. BURLINGTON & MISSOURI RIVER R. R. Co., 22 IOWA 91

1. Swamp Lands—Act of Congress of March 3, 1857, Granting Them to Counties—Effect—Subsequent Grant by Congress in Aid of Railroads—Constitutionality and Validity.—The Act of Congress of March 3, 1857, to the effect that the selections of swamp and overflowed lands, made and reported to the commissioner of the general land office before its passage, so far as they remained vacant and unappropriated, should be confirmed, approved and patented to the states, as soon as practicable, agreeably to the provisions of the Act granting them, invested the title absolutely and immediately in the several states (including Iowa) of such lists of such lands, whether actually swamp or overflowed or not, as had before that time been made out and reported to such commissioner, except such lands as interfered with actual settlements made under pre-existing laws: And no patent or certificate was necessary to issue to the several states (including Iowa) to perfect such title; but such patents or certificates, when issued, were only *evidence* of the title granted by the Act.

The subsequent Act of Congress of May 15, 1856, granting lands in Iowa, in aid of the construction of railroads, in so far as it conflicts with the vested rights of the state and those holding under or through it, in and to any such swamp or overflowed lands, is unconstitutional, and all proceedings thereunder are void; and a railroad company who performs the conditions of the last mentioned Act after the taking effect of the first mentioned Act has no right or title to any land vested in the state as aforesaid, pp. 120-123, 128, 129.

Reaffirmed in Montgomery County v. B. & M. Riv. R. R. Co.,

38 Iowa 208, 209; *American Em. Co. v. C. R. I. & P. Ry. Co.*, 47 Iowa 516, 517; *American Em. Co. v. Fuller*, 83 Iowa 608, 609, 50 N. W. 51.

Reaffirmed and explained in *Page County v. B. & M. R. R. Co.* 40 Iowa 521, holding that where the subsequent Act of Congress granting lands in aid of the construction of railroads attempted to take any of the swamp lands previously granted, it was, to that extent, void, and that the allotment of any such lands to railroads by commissioners under the subsequent Act interfered with the vested rights of counties, and the allotments or proceedings were void—And in *C. R. I. & P. R. R. Co. v. Brown*, 40 Iowa 334, 335; *Hays v. McCormick*, 83 Iowa 92, 95, 49 N. W. 71, (reaffirming the text) this identical question was decided in favor of an individual holding title to swamp lands under the prior grant, and against a railroad and its grantee claiming title under the subsequent Act.

Cited with approval in *Blair Town Lot & Land Co. v. Kitteringham*, 43 Iowa 465, the court holding that after the passage of the Act of Congress of June 2, 1864, granting lands to the Cedar Rapids & Missouri River Railroad upon its performing certain conditions as to the construction of railroad, no one has a right to pre-empt any such land in conflict with the rights of the company; that such Act created a conditional grant *in presenti* to be made definite by the location of the road and performance of conditions by the company.

Cited in *Iowa R. R. Land Co. v. Antoine*, 52 Iowa 430, 3 N. W. 469, not in point.

Special Cross reference. For further cases citing the text, and others in this connection, see annotations under *Iowa Homestead Co. v. Webster County* (21 Iowa 221), Vol. II, p. 895.

Cross references. See further on this question, annotations under Rule 1 of *Allison v. Halfacre* (11 Iowa 450), Vol. I, p. 841.

See, also, in this connection, annotations and cross references under *Stockdale v. Treasurer of Webster County* (12 Iowa 536), Vol. II, p. 93.

STRYKER v. POLK COUNTY, AND TIFFIN, TREASURER, 22 IOWA 131

I. Taxation and Revenue—Lands Granted by United States to Iowa in Aid of Improvement of Navigation of Des Moines River—When Taxable in Hands of Bona Fide Purchasers from State and Their Grantees—Statutes Construed.—Lands granted by the United States to the state of Iowa in aid of the improvement of navigation of the Des Moines River, by Act of Congress of August 1846, are taxable in the possession of *bona fide* purchasers from the state, and their grantees, from the time the conveyance thereto issued by the state. The subsequent joint resolution of Congress of May 2, 1861, and the Act of Congress of July 1862, making definite and extending the boundaries of such lands and quieting the title thereto in the possession of *bona*

fide purchasers from the state, relate to and take effect from the dates of the execution of the conveyances by the state, pp. 134-136.

Reaffirmed in Litchfield v. Hamilton County, 40 Iowa 68, 69.

Cited in Sillyman v. King, 36 Iowa 211, the court holding that when land is purchased by an individual from the United States it is no longer the property of the Government, but of the purchaser, unless it has been reserved from sale or has been previously sold, and then the entry might be canceled on the ground of mistake; but that where there is no such mistake, the holder of the certificate of entry or location having purchased and paid for the land, is the owner thereof, and, although the naked, technical, legal title remains in the United States until the patent is issued, yet, in equity, the title is in the purchaser: Holding, also, that the holder of the certificate is the owner in the same sense as if he held the patent, the issuance of the patent only perfecting the evidence of his ownership.

Cited in Bishop v. O'Brien County, 144 Iowa 571, the court holding that a *bona fide* purchaser of land from the Sioux City Ry. Co., which land was granted to it by Act of Congress of May 12, 1864, the company having complied with the conditions of the grant before the sale thereof, must pay the taxes thereon, and it is subject to taxation from the date of sale, and even before the issuance of a patent therefor to such purchaser—And the Act of Congress of March 3, 1887, does not affect this rule.

Cited in Crum v. Cotting, 22 Iowa 419, not in point.

Special Cross reference. For further cases citing, sustaining and explaining the text, and many others, see annotations under Iowa Homestead Company v. Webster County (21 Iowa 221), Vol. II, p. 895.

Cross reference. See further, annotations and cross references under Fremont County v. B. & M. Riv. R. R. Co. (22 Iowa 91), next preceding this present case.

DAVIS, WATSON & Co. v. HUMPHREY, 22 IOWA 137

1. Exemptions—Statutes Concerning Liberally Construed.—

An exemption statute will be liberally construed in favor of one claiming its benefit, and to carry out its object and spirit, p. 140.

Special Cross reference. For cases citing, and sustaining the text, and many others on the question, see annotations under Rule 1 of Bevan v. Hayden, sheriff, (13 Iowa 122), Vol. II, p. 127.

STATE v. TAIT & TAIT, 22 IOWA 140

1. Criminal Law—Appeal from Justice's to District Court—

State May Appeal—Proceedings in District Court.—Under Sec. 5094 of the Code of 1860, the right of appeal from a judgment in a justice's court in a criminal prosecution applies equally to and for the

benefit of the state; and upon such appeal, a trial *de novo* will be had. Sec. 5094, above, is constitutional.

An acceptance by the county treasurer of and receipt for the fine imposed in the justice's court, does not bar the state of its right of appeal, pp. 141-143.

Reaffirmed and extended in State v. Roney, 37 Iowa 32, holding further that a prosecuting witness who has been adjudged to pay the costs of a criminal prosecution in a justice's court upon the acquittal of accused therein, may, in the name of the state, appeal therefrom to the district court, and have a trial *de novo* to determine the justice of such ruling as to the costs.

Reaffirmed and narrowed in State v. Van Horton, 26 Iowa 403, 406, holding that if accused is acquitted in a justice's court having jurisdiction of the offense, the state cannot, by appeal, force him into another trial; but the state may appeal in such case only to settle the law for future cases.

Distinguished in State v. Westfall and Mathews, 37 Iowa 576, holding that where defendant pays a fine imposed upon him upon the trial of an indictment he cannot, thereafter, appeal to the Supreme Court from the satisfied judgment.

O'HARE v. CITY OF DUBUQUE, 22 IOWA 144

1. Municipal Corporations—Taxation—Agricultural and Mining Lands Within City Limits—When Subject to Taxation.—Where agricultural, or mining land is situated in a city limits on a street thereof and receives the advantages and benefits of the city, and is thereby enhanced in value, it is subject to city taxation, pp. 145, 146.

Special cross reference. For cases citing, explaining and qualifying the text, and many others on this question, see annotations under Langworthy v. City of Dubuque (13 Iowa 86), Vol. II, p. 121.

Cross reference. See further on this question, annotations and cross references under Rule 1 of Buell v. Ball, marshal (20 Iowa 282), Vol. II, p. 817.

TODD v. JONES & JONES, 22 IOWA 146

1. Conveyances—Acknowledgment—Sufficiency of Certificate.—A certificate of acknowledgment to a conveyance that "this day personally appeared before me, etc., who are *to me known* to be the identical persons, etc.," is sufficient.

The omission of the word "personally" before the word "known" in such certificate, is not fatal, p. 147.

Reaffirmed in Rosenthal v. Griffin, 23 Iowa 263.

Cross reference. See further on this question, annotations and note under Rule 2 of Bell v. Evans (10 Iowa 353), Vol. I, p. 703.

McMENOMY v. McMENOMY, 22 IOWA 148

1. Descent and Distribution—Widow Does Not Inherit from Deceased Husband as “Heir” of Deceased Child—Meaning of the Word “Heir”.—A widow of a deceased husband does not, under Secs. 2436, 2437, 2495, 2496 of the Code of 1860, inherit any part of his estate as “heir” of a child who died before the husband.

The word “heir” in the statutes of descent includes children and even grand children who survive the decedent, but not such who die before him, pp. 150, 151.

Reaffirmed in Journell v. Leighton, 49 Iowa 603, holding that a divorced wife does not—under Sec. 2454 of the Code of 1873—inherit any part of the estate of a deceased former husband as “heir” of his children or grand children who die before him.

Reaffirmed as to first paragraph in In re Will of Overdieck, 50 Iowa 246, 247, under Sec. 2454 of the Code of 1873, corresponding to Sec. 2437 of the Code of 1860.

Cited in Jacobs v. Jacobs, 42 Iowa 607, the court holding that the word “heirs” when used in a will, ante-nuptial contract, or other instrument, will be limited to *children* when such intention is apparent.

Cited in In re Hulett’s Estate, 121 Iowa 426, the court holding that where property is devised to the mother of testator, and she dies before him, then, upon the death of the testator, son, the property devised descends, under Sec. 3281 of the Code of 1897, to his brother and sister as heirs of the deceased mother: But that such property is subject to an inheritance tax as provided by Sec. 1467 of the Code of 1897.

Cited in Downing v. Nicholson, 115 Iowa 495, 88 N. W. 1065, 91 Am. St. Rep. 175, the court holding that Sec. 3281 of the Code of 1897, and sections of prior codes corresponding thereto, was enacted to prevent lapses: That it applies to a devise to a class of persons who are living at the time the will is executed; and that if, thereafter, any of such class of devisees die before the testator, their heirs inherit under such section: Holding, however, that where a residuary clause in a will leaves the remainder of testator’s property to his nieces and nephews, share and share alike, such clause applies only to the nieces and nephews living at the time of the execution of the will; and does not include children or heirs of a niece or nephew who was dead at the time the will was executed.

Distinguished in Blackman v. Wadsworth, 65 Iowa 82-84, 21 N. W. 191, 192, holding that under Sec. 2337 of the Code of 1873, a brother is an “heir” of a devisee who dies before the testator, and inherits such devisee’s amount under the will: Holding, however, that a widow of such devisee is not an “heir” under the Section mentioned.

HERSHLER v. REYNOLDS, 22 IOWA 152

1. Principal and Surety—Discharge of Principal Discharges Surety—What Acts Constitute Such Discharge.—Any valid agreement or act of the creditor founded upon a sufficient consideration, and without the consent of the surety, whereby the creditor precludes himself from demanding performance of the principal, or entitles the latter to an exemption from performance for any period of time, discharges the surety; and this rule applies either before or after judgment on the obligation or contract, pp. 155-156.

Reaffirmed in Chickasaw County v. Pitcher, 36 Iowa 598; Roberts v. Richardson, 39 Iowa 291.

Reaffirmed and explained in Tousey, Floyd & Love v. Bishop, 22 Iowa 182-184, holding that any agreement that would be ineffectual to tie the hands of the creditor, as against the principal debtor, would likewise be ineffectual to operate as a discharge of the surety.

Reaffirmed and extended in Lambert v. Shitler, 62 Iowa 76, 17 N. W. 188, holding further that in order to release a surety by the creditor by a valid agreement, based upon a new consideration, extending additional time to the principal, it is not necessary that the agreement expressly grant the time extension; it is sufficient if this is the necessary effect of the agreement.

Cross references. See Rule 2 hereof. See further on this question, annotations and cross references under Chambers v. Cochran and Brock (18 Iowa 159), Vol. II, p. 606.

2. Replevin—Plaintiff Consenting to Judgment Binds Sureties on His Bond, When.—Where a plaintiff in an action of replevin consents to judgment, provided execution be stayed for a given time, such judgment—under Secs. 3293 and 3300 of the Code of 1860—binds the sureties on his bond, where they fail to object thereto at the time of the judgment, pp. 156, 157.

Reaffirmed and extended in Drake v. Smythe, 44 Iowa 412, 413, holding further that where appellant, upon an appeal to the Supreme Court, agrees to an affirmance of the judgment below, without damages, the execution thereon to be stayed for a given period, such agreement and judgment of affirmance binds the sureties on the supersedeas bond, although done without their knowledge or consent.

Reaffirmed and extended in McIntire v. Eastman, 76 Iowa 458, 41 N. W. 163, holding further that under Secs. 3229, 3238, 3239 and 3242 of the Code of 1873, a judgment in an action of replevin shall award the right to the possession of the property involved, and any damages for its illegal detention to the person entitled thereto; and that the judgment in such action may be against the plaintiff and the sureties on the replevin bond, without formal proceedings making the latter parties.

Cited with approval in Sousey, Floyd & Love v. Bishop, 22 Iowa 208, turning on another point.

Cited in Crites v. Littleton, 23 Iowa 208, the court holding that no one can appeal from a judgment in an action except parties thereto; that persons who are either directly or remotely interested in the result, but who are not parties cannot appeal therefrom: And therefore holding that a surety in a replevin bond cannot prosecute an appeal from a judgment solely against his principal (plaintiff) in the replevin action.

Distinguished and narrowed in Okey v. Sigler, 82 Iowa 99, 100, 47 N. W. 912, holding that where in an action on a promissory note for more than one hundred dollars, against the maker or principal and his surety thereon, the surety suffers judgment by default, and thereafter, without his knowledge or consent, judgment is entered against the maker, principal, under an agreement whereby a stay of execution was provided for in the judgment for more than six months *from the date of the judgment*, allowed by Sec. 3061 of the Code of 1873, such agreement and stay released the surety, and execution for such judgment or debt against such surety after six months from the rendering of the judgment stayed, will be enjoined.

STATE v. MORRISEY, 22 IOWA 158

1. Burglary — Housebreakng — Indictment — Allegation as to Owner of the Buildings Broken, Necessary.—An indictment for burglary or housebreaking under Sec. 4235 of the Code of 1860, must aver the name of the owner of the building broken, if known to the grand jury, and if not so known the indictment must so state, pp. 159, 160.

Reaffirmed, explained and narrowed in State v. Jelinek, 95 Iowa 421, 422, 64 N. W. 260, holding that the object of the statute requiring the name of the owner to be given in an indictment for burglary is to fix the identity of the building broken into; and that—under Sec. 4302 of the Code of 1873—where the offense is otherwise described with sufficient certainty to identify the act, an erroneous allegation as to the name of the owner of the building, is not material.

Reaffirmed and varied in State v. Wasson, 126 Iowa 322, 323, 101 N. W. 1126, holding that an indictment for robbery must aver the ownership of the property.

Reaffirmed and qualified in State v. Wrand, 108 Iowa 74, 75, 78 N. W. 789, holding that a mistake in the Christian name of the owner of the building in an indictment for burglary, is not material: That in the absence of a showing of prejudice resulting to accused, an erroneous allegation in an indictment as to the name of the party injured is not—under Sec. 5286 of the Code of 1897—material.

Reaffirmed and narrowed in State v. Golden, 49 Iowa 51, holding that an indictment for burglary naming the rentor or tenant in possession as the owner of the building broken into, is sufficient.

Cross reference. See further on this question, annotations and

cross references under *State v. Cunningham* (21 Iowa 433), Vol. II, p. 923.

HOUPES v. ALDERSON, 22 IOWA 160

1. **Easements—Right to Place Gates Across Private Right of Way—Wrongful Removal—Damages.**—The owner of land burdened with a private right of way across it for the use of another, may place or erect gates at the ends of the right of way, for the purpose of protecting his inclosure, if the gates so erected are not so constructed as to unreasonably and unnecessarily inconvenience the owner of the way in the enjoyment of his easement; and if the owner of the way removes any such gates so rightfully erected, he is liable to the land owner for the damages resulting therefrom.

This rule does not apply where the contract or deed granting the right of way stipulates or shows that the grantor is to fence it, pp. 162, 163.

Reaffirmed and explained in *Amondson v. Severson*, 37 Iowa 606, 607, holding that a grant of a private right of way across a farm passes only what is necessary to the fair and reasonable use of the easement; that in such case the grantor is not required to fence the way unless this is provided for in the contract, but may erect gates to protect his inclosure; and if the owner of the way fails and refuses to close such gates, he is liable to the land owner for the damages resulting therefrom.

BARNEY v. IVINS, 22 IOWA 163

1. **Conveyances—United States Revenue Stamp to Be Affixed to—Inadmissible in Evidence Without.**—A conveyance to which a United States Revenue stamp is required to be affixed, by Act of Congress of June 30, 1864, is inadmissible in evidence without it is affixed thereto, p. 165.

Special cross reference. For cases citing and *overruling* the text and others, see annotations under *Hugus v. Strickler* (19 Iowa 413), Vol. II, p. 743.

WOLCOTT v. RICKEY, 22 IOWA 171

1. **Parent and Child—Emancipation of Minor Child by Father—Right of Child to Earnings and Property Acquired by—Rights of Creditors of Father.**—Where a father allows a minor child to work for himself, money earned and property thereby acquired by the latter is not, in the absence of an actual intent to defraud, subject to the satisfaction of the father's debts, p. 173.

Reaffirmed and explained in *Pristor v. Ch. & N. W. Ry. Co.*, 128 Iowa 482, 104 N. W. 488, holding that a father may emancipate his son, and put him on the same footing as to his services as if he had

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already attained the age of twenty-one years; and that such emancipation may be by parol or in writing, and may be proven by circumstantial evidence, or implied from the conduct of the parties.

Cited in Brainard v. Van Kuran, 22 Iowa 265; Hamilton v. Lightner, 53 Iowa 474, 5 N. W. 606, not in point, but involving fraudulent conveyances and transactions by husband to and with his wife.

(Note.—See further, Kubic v. Zembe, 106 Iowa 269, 76 N. W. 700; Porter v. Powell, 79 Iowa 151; 44 N. W. 296, 18 Am. St. Rep. 353, 7 L. R. A. 176; Bener v. Edgington, 76 Iowa 106, 40 N. W. 117; Nixon v. Spencer 16 Iowa 214, some important cases on this question not citing the text.—Ed.)

Cross references. See further on this question, annotations and note under Rule 1 of Dawson v. Dawson, (12 Iowa 512), Vol. II, p. 84; Everett v. Sherfey (1 Iowa 356), Vol. I, p. 428.

See, also, Flynn v. Baisley, 76 Am. St. Rep. 495, 45 L. R. A. 645; Halliday v. Miller, 6 Am. St. Rep. 653.

GILROY v. ALIS, 22 IOWA 174

1. Contract for Sale or Exchange of Lands—Specific Performance—When Not Decreed.—A contract for sale or exchange of land will not be specifically enforced, when to do so would be inequitable and unjust, pp. 175, 177.

Reaffirmed in Wilmer v. Farris, 40 Iowa 310.

Cross reference. See further on this question, annotations under Harper v. Sexton (22 Iowa 442), *Infra.* p. 52.

TOUSEY, FLOYD & LOVE v. BISHOP, 22 IOWA 178

1. Principal and Surety—Extension of Time to Principal Without Consent of Surety—When Does Not Discharge Surety.—Any agreement that would be ineffectual to tie the hands of the creditor as against the principal debtor, would likewise be ineffectual to operate as a discharge of the surety, p. 184.

Reaffirmed and explained in Dwinnell v. McKibben, 93 Iowa 336, 61 N. W. 986, holding that where an extension of time of payment of a note is procured by fraud of the principal (maker), the surety thereon is not released or discharged.

Cross reference. See further on this question, annotations and cross reference under Hershler v. Reynolds (22 Iowa 152), *ante.* p. 14.

HERSHEY v. CITY OF MUSCATINE, 22 IOWA 184

1. Municipal Corporations—City of Muscatine—Lots Within New City Boundary—When Subject to Taxation.—The decision in Morford v. Unger, 8 Iowa 82, holding the Act of July 14, 1856, extending the boundary of the city of Muscatine, unconstitutional in so

far as it seeks to subject to city taxation certain agricultural lands does not apply to lots lying in such new boundary, within a short distance of the old city limits, not used for agricultural purposes, and receiving the protection and advantages of the city government; and the latter are subject to city taxation, p. 185.

Special cross reference. For cases citing the text, and others on this question, see annotations under *Butler v. City of Muscatine* (11 Iowa 433), Vol. I. p. 838.

Cross reference. See further on this question, annotations and cross references under Rule 1 of *Buell v. Ball, marshal* (20 Iowa 282), Vol. II. p. 817.

HENN, ADM'R *v.* THE STATE UNIVERSITY, 22 IOWA 185

(Later Appeal, 26 Iowa 594, abstract.)

1. State University as Vendor of Its Lands—Rights of When Sued by Vendee.—The State University when sued by a vendee under a contract for sale of its lands, has the same equitable rights as other vendors of land, these rights not being taken away by Secs. 1975 and 1979 of the Code of 1860, p. 192.

Overruled in *Weary v. The State University*, 42 Iowa 336, 339, holding that the State University is not a corporation, and cannot be sued.

STATE *v.* HASS, 22 IOWA 193

1. Intoxicating Liquors—Nuisance—Indictment—Allegations.—An indictment for nuisance under Sec. 1564 of the Code of 1860, must allege either that the defendant unlawfully sold intoxicating liquors in a building or place, or that he had such liquors in such building or place for the purpose of unlawful sale.

Such an indictment charging defendant with "using and keeping a place or building for the purpose of selling intoxicating liquors," not alleging a sale or keeping for sale therein, is insufficient, p. 193.

Reaffirmed in *State v. Harris*, 27 Iowa 431.

Reaffirmed and explained in *State v. Tierney*, 74 Iowa 238, 37 N. W. 176, holding that if the liquors are not manufactured or sold, they must be kept on the premises to constitute the offense of nuisance under the statute, and this fact must be alleged in the indictment.

Reaffirmed and explained in *State v. Niers*, 87 Iowa 724, 726, 54 N. W. 1077, holding that an indictment for nuisance under Secs. 1564 of the Code of 1860, or Sec. 1543 of the Code of 1873, which charges that the defendant kept and maintained a building for the purpose and with the intent of selling intoxicating liquors contrary to law, and kept such liquors therein with such purpose and intent, and sold them unlawfully therein, is not bad for duplicity: That such an indictment may aver any or all of the acts set out in the statute, as constituting

the nuisance as done by defendant, they being alleged in the conjunctive, where more than one is charged or set out therein.

Cross references. See further on this question, annotations under *State v. Baughman* (20 Iowa 497); *State v. Becker* (20 Iowa 438), Vol. II, pp. 852 and 839, respectively.

ARNOLD v. POTTER, 22 IOWA 194

1. Contracts—Conflict of Laws—Lex Loci Contractus—When and When Does Not Apply—Usury.—The law of the place where the contract is made is to govern in enforcing and expounding it, unless the parties provide for its execution elsewhere, in which latter case it is to be governed by the law of the latter place.

The parties may, however, if the contract is made in one place to be executed in another, stipulate that it is to be governed by one or the other.

Where a contract concerning or bearing interest is made in one state and is to be performed in another, and the rate of interest in the former differs from that in the latter, the parties may stipulate in the contract which law shall govern the subject; but in the absence of such stipulation, the law of the place where the contract is to be performed governs. But where the interest expressed is usurious, both by the law of the place of making the contract and that where it is payable, the law of the former will govern as to the consequence of the usury, pp. 198, 199.

Reaffirmed and explained in *Bigelow v. Burnham*, 83 Iowa 122, 123, 49 N. W. 104, 32 Am. St. Rep. 294, holding—as does the present case—that the law of the place where a contract is to be performed as shown by its terms, governs the question of its validity: That when a contract is made in one state, to be performed in another, and in express terms provides for a rate of interest which is lawful in one, but unlawful in the other, the parties will be presumed to contract with reference to the laws of the state wherein the rate of interest is lawful, which presumption will prevail until overcome by proof that the stipulation was intended to defeat the usury law, and to support a contract otherwise usurious.

Reaffirmed and explained as to first paragraph in *Smith & Co. v. McLean*, 24 Iowa 329, 330, holding that a chattel mortgage executed in and registered or recorded according to the laws of another state, will receive the same interpretation and be equally obligatory in this state as in the foreign state, both as between the parties and as to third persons purchasing or claiming a lien upon the mortgaged personality subsequent to the recording or registration of the instrument.

Reaffirmed and extended in *Nichols & Shepard Co. v. Marshall*, 108 Iowa 519-521, 79 N. W. 282, holding further that a note which is void in the state where it is executed and payable, is void everywhere.

Reaffirmed and extended as to first and second paragraphs in

Mardens v. Hotel Owners' Ins. Co., 85 Iowa 588, 52 N. W. 510, 39 Am. St. Rep. 316, holding further that a policy of fire insurance issued by an insurance company of this state and issued in this state, and where the premium note therefor is made payable in this state, is governed by the laws of this state, although the property insured is situated in a foreign state, and though the policy be issued pursuant to a verbal agreement or arrangement made in the foreign state.

Cited in *Dorr Cattle Co. v. Des Moines Nat'l Bank*, 127 Iowa 162, 98 N. W. 922, 4 Am. & Eng. Ann. Cas. 519, the court holding that in an action for damages, the *lex fori* governs the character and extent of the remedy, unless the remedy has been created inferentially or directly with the right, and has become part of it by the statute of another state.

Cited in *Austin v. Walker*, 45 Iowa 529, on argument in the present case as to a contract evading usury laws, otherwise not in point *Distinguished and narrowed in* *Talbot v. Merchants' Despatch Transportation Co.*, 41 Iowa 251, 20 Am. Rep. 589, holding that where a provision in a bill of lading exempting a common carrier from liability for loss of freight under certain conditions or by certain causes, is valid in the state where the contract or bill of lading is made, and in the state where the loss of the freight occurs from such a cause, or under such a condition, it is valid here, although contrary to the laws hereof.

Cross reference. See further on this question, annotations and cross references under *Butters v. Olds* (11 Iowa 1), Vol. I, p. 758.

2. Conflict of Laws—Penal Statutes of Another State not Enforced Here—Usury Statute is not Such.—A penal statute of another state will not be enforced by a court of this state.

A statute, however, of another state providing for *forfeiture* of a certain portion of a usurious note or contract, is not a penal statute, and will be enforced by a court of this state, pp. 202, 204.

Reaffirmed and explained as to first paragraph in *Taylor, Farr & Co. v. Western Union Tel. Co.*, 95 Iowa 744, 64 N. W. 661, holding that in an action in this state for damages for negligent delay in delivering a telegram sent from one place to another to a foreign state, the plaintiff cannot recover damages given by way of an additional penalty by statute of such foreign state.

Cross reference. See further on this question, annotations under Rule 1 of State ex rel. *Stone v. Helmer* (21 Iowa 370), Vol. II, p. 916.

THOMSON v. LEE COUNTY, 22 IOWA 206

1. Foreign Judgments—Federal Circuit Court Judgments are not—Action on in this State—Defenses.—The circuit courts of the United States are not to be regarded as foreign tribunals by the courts of states other than that in which the federal court was holden which

rendered the judgment, so that a party can re-litigate in an action on such judgment, the same defenses which were pleaded by and decided against him in the first action, p. 209.

Cited in *Ex parte Holman*, 28 Iowa 109 (cited in dissenting opinion, 180), the majority court opinion holding that *Habeas Corpus* will not issue from a state court to test the question of whether or not a person is unlawfully detained under a process or warrant, issued from a United States Court.

2. Domestic Judgments—Action on.—Actions upon domestic judgments are not uncommon, and are probably sustainable, unless the legislature should interpose to prevent a party from being sued upon a judgment which is in full force, and on which execution can issue without any new recovery, p. 210.

Reaffirmed and explained and extended in *Simpson v. Cochran & Cherrie*, 23, Iowa 82, 83, 92 Am. Dec. 410, holding further that a judgment, whether domestic or of another state, gives to the party in whose favor it is rendered, a complete right of action; that it is a contract of the highest character, and he may declare upon it and recover as upon any other contract: That the right to execution thereon is merely cumulative, and the law does not deny the right of action on a judgment, if the holder elects that remedy.

3. Appeal—Defense Not Pleaded Below Disregarded.—A defense not pleaded below will be disregarded upon appeal to the Supreme Court, p. 210.

Reaffirmed in *Wilson v. Riddick*, 100 Iowa 706, 69 N. W. 1041.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

HAMILTON *v.* BISHOP, SHERIFF, 22 IOWA 211

1. Fraud and Collusion—Allegations of to be Proved—Burden of Proof.—Allegations of fraud or collusion must be established by evidence by the party averring them, pp. 213, 214.

Reaffirmed and explained in *Prichard v. Hopkins*, 52 Iowa 122, 123, 2 N. W. 1031; *Wood v. Scott*, 55 Iowa 116, 7 N. W. 466; *Ley v. Met. Life Ins. Co.*, 120 Iowa 208, 94 N. W. 569, holding that fraud will never be presumed, but the burden is on the party alleging it to prove it by satisfactory evidence: And that fraud will never be imputed when the facts upon which the charge is predicated are, or may be, consistent with honesty and purity of intention.

Cross reference. See further on this question, annotations under Rule 3 of *Lyman v. Cessford* (15 Iowa 229), Vol. II. p. 330.

DEEDS *v.* SANBORN, 22 IOWA 214

(Later Appeal, 26 Iowa 419.)

1. Municipal Taxation—Agricultural Lands Within Original Boundary of City, Not Subject to—Remedy of Land Owner.—Lands

situated within the original boundaries of a city and which are used for agricultural purposes are not subject to city taxation; and this question can be raised in an action of replevin against an officer who levies upon personal property in seeking to collect such a tax, p. 217.

Special cross reference. For cases citing the text, and others on this question, see annotations under Rule 1 of Buell v. Ball, marshal (20 Iowa 282), Vol. II, p. 817; and see cross references there found.

DALBY v. CRONKHITE, 22 IOWA 222

1. Judgment Lien on Real Estate—Parol Release of—Proof Necessary to Establish.—A parol release of a judgment lien on real estate can only be established by proof which is clear, satisfactory and conclusive: He who seeks to overturn a legal right or title, by parol, must make his proof conform to these requirements, pp. 223, 224.

Reaffirmed and qualified in Holt v. Brown & Co., 63 Iowa 325, 19 N. W. 238, holding that upon a jury trial involving the enlargement of a written contract by parol, such facts need only be proved by a preponderance of the evidence.

Cross reference. See further on this question, annotations under Rule 2 of Cooper v. Skeel (14 Iowa 578), Vol. II. p. 288.

ACKLEY v. BERKEY, 22 IOWA 226

1. Appeal—Verdict Against Evidence—Conflicting Evidence—Reversal, When.—The Supreme Court will not reverse a judgment in an action at law because the verdict was against the evidence, when the trial court refused to grant the new trial, and the evidence adduced below was conflicting, and it does not appear from the record that the verdict was clearly against the evidence, or there are other circumstances strongly indicating that injustice was done Appellant, pp. 227, 228.

Reaffirmed in Pierce v. Walker, 23 Iowa 426.

Reaffirmed and explained in Conner & Co. v. Mountain, 28 Iowa 593 (abstract), holding that when the evidence is conflicting, and the court who tried the case and heard the testimony as it was detailed by the witnesses refuses to interfere with the verdict, there must be a very strong and clear case made in order to justify the interference of the Supreme Court.

Reaffirmed and extended in Lay v. Wissman, 36 Iowa 306, holding further that the rule is equally applicable to a judgment upon a trial by the court in an action at law.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Newell v. Sanford (10 Iowa 396), Vol. I, p. 712.

FINCH v. BILLINGS, 22 IOWA 228

1. Change of Venue in Civil Case—Application for After a Continuance—What to State.—Where an application for a change of venue in a civil case is made after the cause has been continued for a term, the applicant must—under the Code of 1860—allege therein that the ground for the change was unknown to him at the time of or prior to the continuance, p. 230.

Reaffirmed in McCracken v. Webb, 36 Iowa 553.

Reaffirmed in Ferguson v. Davis County, 51 Iowa 222, 223, 1 N. W. 508, under the Code of 1873, the case turning upon other points.

Reaffirmed and extended in Petty v. Hayden Bros., 115 Iowa 215, 88 N. W. 340, holding further that—under Sec. 3506 of the Code of 1897—an application for a change of venue in a civil cause cannot be made after issue is joined and it is called, and passed for the trial of other actions, unless the application for the change aver that the ground for the change was unknown to the applicant at the time of such calling and passing.

Cross reference. See further on this question, Secs. 3505, 3506 of the Code of 1897.

2. Appeal—Error Which Could Have Been Corrected Below, When Not Reviewed.—Errors which could have been corrected below will not—under Sec. 3545 of the Code of 1860—be reviewed or considered upon appeal to the Supreme Court, unless a motion for their correction be made below before the prosecution of the appeal.

This rule applies where the judgment appealed from is for more than is claimed in the petition, p. 230.

Reaffirmed and explained in Black v. Boyd, 52 Iowa 720, 2 N. W. 1045; Brownlee v. Marion County, 53 Iowa 490, 5 N. W. 612; Yancey v. Patlock, 93 Iowa 388, 389, 61 N. W. 998, holding that under Sec. 3168 of the Code of 1873, before an error which might have been corrected below will be reviewed upon appeal to the Supreme Court, a motion for its corrections must have been made below, or at least the attention of the lower court must have been called to the supposed error before the prosecution of the appeal: And that this rule applies where the judgment appealed is claimed to be excessive.

Cross reference. See further on this question, Sec. 4105 of the Code of 1897.

*FULMER v. FULMER, 22 IOWA 230

1. Pleadings—Amendments—Judicial Discretion of Trial Court—Abuse of—Reversal.—The matter of allowing or rejecting amend-

*Note.—The case of Brownlee v. Marion County, 53 Iowa 490, 5 N. W. 612, cites this case; but, as it manifestly intends to cite Rule 2 of Finch v. Billings, 22 Iowa 228, next preceding, it is omitted here, and is there placed.—Ed.

ments is to a very considerable extent one of sound judicial discretion, and the ruling on such matters will only be interfered with by the Supreme Court, where substantial prejudice has resulted to the party complaining, p. 232.

Reaffirmed in Snediker v. Poorbaugh, 29 Iowa 489; Guyer & Hoshaw v. Minn. Thresher Mfg. Co., 97 Iowa 134, 66 N. W. 84.

Reaffirmed and explained in Pride v. Wormwood, 27 Iowa 262, holding that where a party's request to amend is reasonable and its refusal works manifest injustice, it will be ground for reversal.

Reaffirmed and extended in Robinson v. Erickson, 25 Iowa 86, holding further that after a pleading, which is a repetition of a former pleading, is filed by leave of court, it may be stricken on motion.

Reaffirmed and extended in Smith v. Howard, 28 Iowa 53, holding that the trial court has a very large judicial discretion in the matter of allowing or refusing to allow amendments both to conform to the proof and otherwise, and his ruling thereon will not be ground for reversal, unless the Supreme Court is satisfied that it was not in furtherance of justice.

(Note.—There are many other cases sustaining and explaining, but not citing, the text.—Ed.)

Cross references. See further on this question, annotations under State ex rel, Floyd v. Mayor of Keokuk (18 Iowa 388), Vol. II, p. 653; Rule 2 of Seevers, Adm'r v. Hamilton (11 Iowa 66), Vol. I, p. 773.

See further, specially, Sec. 3600 of the Code of 1897; and see, also, Secs. 3560, 3591 and 3597 thereof, in this connection.

2. Appeal—Error to Prejudice of Appellant to be Shown, to Authorize Reversal.—In order to authorize a reversal upon an appeal to the Supreme Court the appellant must—under Secs. 2978 and 3111 of the Code of 1860—not only affirmatively show error in the proceedings below, but he must also show that his substantial rights were thereby prejudiced, p. 233.

Reaffirmed in Jones v. Berryhill, 25 Iowa 292, 293.

Reaffirmed and qualified in State v. Miller, 124 Iowa 434, 100 N. W. 335, holding that if from the entire record upon appeal, it appears that an error committed below was harmless, it will not work a reversal.

Cross references. See further on this question, annotations and cross references under Rule 1 of Fletcher v. Burroughs (10 Iowa 557), Vol. I, p. 748. See, also, on this question, Secs. 4101 and 4139 of the Code of 1897.

LATHROP v. DONALDSON, 22 IOWA 234

1. Bills and Notes—Negotiable Note—Presumption in Favor of Holder.—Possession and production of a negotiable note by the plaintiff in an action thereon against the maker, raises the presumption that

he obtained it in good faith, for value and before maturity, and that he is unaffected by equities or defenses existing in favor of the defendant, maker, against the payee; and this presumption will prevail until overcome by proof, p. 237.

Reaffirmed in Shaulis v. Buxton, 115 Iowa 429, 430, 88 N. W. 970.

Reaffirmed and explained in Cox v. Cline, 139 Iowa 130, 117 N. W. 49, holding that the mere possession of a note by the plaintiff in an action thereon raises a presumption, without other evidence, that he is a holder in good faith, and it is not until it has been shown by appropriate evidence that the instrument was procured and put in circulation by fraud, that any burden is cast upon him to explain his possession, and give affirmative evidence that he acquired title in due course of business and without notice of the fraud.

Cross references. See specially, in this connection, Secs. 3060a 55, and 3060a 59 of the Code Supplement of 1907.

ARTHUR v. FUNK, 22 IOWA 238

1. Costs—Apportionment of—Ruling of Trial Court Concerning—Judicial Discretion—Reversal on Appeal, when.—Secs. 3449 and 3451 of the Code of 1860, in reference to an equitable apportionment of costs by the trial court, where the successful party fails as to part of his demand, or a party fails as to part of several issues and succeeds as to others, applies to a case where a defendant recovers part of his counterclaim or cross demand.

The trial court has (under Sec. 3465 of the Code of 1860) a sound judicial discretion on the question of costs; and his ruling in such a case will not be ground for reversal, except in case of his abuse thereof, pp. 239, 240.

Reaffirmed in Brinck v. Neiweg, 29 Iowa 445; Bush v. Yeoman, 30 Iowa 480; Koescenbader v. Peirce, 41 Iowa 209.

Reaffirmed and explained in Hatch v. Judd, 29 Iowa 98, holding that a successful party is not entitled, as a matter of course and of law, to full costs under Sec. 3449 of the Code of 1860; but that if there be equitable circumstances, such as a plaintiff or successful party failing in part of his demand, the costs being unnecessarily large by the act or acts of the plaintiff or successful party, or the like, the trial court may, within a sound discretion, apportion the costs as to him seems right.

Cited in McGuire v. Montrass, 102 Iowa 22, 70 N. W. 744, the court holding that in an action for a tort, where the plaintiff recovers damages, the defendant cannot (under Sec. 2934 of the Code of 1873) require him to pay any of the costs for witness fees to support a plea in mitigation, although such proof reduced the verdict to nominal damages; nor can the defendant in such case who is successful under an issue on one of two counts require the successful plaintiff (under

such section) to pay any part of the costs of witnesses used by the defendant in defense of both counts.

Cross reference. See further in this connection, Secs. 3853-3875 of the Code of 1897.

STATE *v.* HILTON AND GORDON, 22 IOWA 241

1. Appeal in a Criminal Case—Evidence Circumstantial—Reversal.—Where upon appeal from a judgment of conviction, it appears that the evidence on the trial of the indictment was entirely circumstantial, and lacking in affirmative force to generate a belief of the probable guilt of accused, the Supreme Court will reverse, p. 242.

Reaffirmed and extended in State *v.* Wise, 83 Iowa 599, 50 N. W. 60, holding further that the Supreme Court will more liberally review a trial court's ruling in refusing to grant defendant a new trial in a criminal case than in civil actions; and where in such a case it appears upon appeal that the verdict was clearly against the weight of evidence and resulted in injustice, the judgment will be reversed.

Cross reference. See further on this question, annotations and cross references under Rule 2 of State *v.* Johnson (19 Iowa 230), Vol. II, p. 719.

McCALEB *v.* SMITH, 22 IOWA 242

(Later Appeal, 24 Iowa 591.)

1. Slander—Construction of Language Published.—In an action of slander the words alleged to be slanderous should be construed in the sense in which the person to whom they were published understood them, p. 245.

Reaffirmed in Desmond *v.* Brown, 33 Iowa 15.

Reaffirmed and qualified in Prime *v.* Eastwood, 45 Iowa 641, holding that in an action of slander, words are to be construed in the sense in which, in the light of all explanatory circumstances known to speaker and hearer, they are calculated to impress the hearer's mind and will naturally be understood.

Cross reference. See further on this question, annotations and cross references under Rule 2 of Barton *v.* Holmes (16 Iowa 252), Vol. II, p. 432.

McNAMARA *v.* ESTES, 22 IOWA 246

1. Municipal Corporations—Taxation—Power to Levy Special Assessments—Construction of Statutes.—A statute conferring upon a municipal corporation the power to levy a special tax and sell in default in payment thereof, will receive a reasonable, but not elastic construction, and one which will truly reflect the legislative intention. Such a power must be conferred by clear and undoubted language, pp. 254, 256.

Cited in C. R. I. & P. Ry Co., *v.* City of Ottumwa, 112 Iowa 305, 83 N. W. 1076, 51 L. R. A. 763, holding that when express power is

conferred upon a municipal corporation to levy a special tax, a substantial compliance with the statute is all which is required: Holding, however, that the right of way of a railroad (not held in fee, but condemned as required by law) is not subject to assessment and taxation for street improvements and sidewalks; that the owner of lots or lands abutting on streets, and not the mere owner of an easement thereover, is the party liable therefor.

Distinguished in Merriam v. Moody's Ex'rs, 25 Iowa 170-175, holding that a municipal corporation has only the powers expressly granted, those necessarily implied or incident to powers expressly granted, and those absolutely essential and indispensable to the declared objects and purposes of the corporation; and that any fair doubt as to the existence of such a corporate power is to be resolved against it, and against the corporation: Holding further that the power to "levy and collect a special tax on lots, for curbing, macadamizing, etc., in front thereof" to be "enforced and collected as may be provided by ordinance," does not authorize the city to pass an ordinance providing for a sale and conveyance of such lots without an action to enforce the taxes; and such sale or sales and deed or deeds made thereunder is or are void.

Cross references. See further on this question, annotations under Ham v. Miller (20 Iowa 450), Vol. II, p. 843; City of Fairfield v. Ratcliff (20 Iowa 396), Vol. II, p. 832; Clark, Dodge & Co. v. City of Davenport (14 Iowa 494), Vol. II, p. 272.

2. Municipal Corporations—Power to Improve Streets and Sidewalks and to Levy a Special Tax Therefor—Statute Construed.—Where the charter of a city confers the power to levy a special tax upon abutting lots, to curb, pave or grade sidewalks, and to pave, plank or macadamize the streets, it includes trimming, guttering and curbing, pp. 254-256.

Reaffirmed and extended in Warren v. Henly, 31 Iowa 35-37, (cited at page 44 on constitutionality of such statutes) holding further that authority to a city to cause its streets and alleys "to be paved, and pavements to be repaired," authorizes their improvement by macadamizing, and the construction of gutters and the putting of curbstone: Holding further that a sidewalk is a part of a street.

Reaffirmed and qualified in Allen v. City of Davenport, 107 Iowa 100, 101, 77 N. W. 536, holding that a *reasonable amount* of excavating in order to prepare the surface of the street for the finished improvement may be charged as part of the cost of paving.

Cross references. See Rule I and cross references there found, in this connection. See further, annotations and cross reference under Rule 2 of Buell v. Ball, marshal (20 Iowa 282), Vol. II, p. 817.

3. Municipal Corporations—Sale for City Taxes—Tax Deed Under—Action by Purchaser to Foreclose Lien—Defenses—Burden of Proof.—In an action by a purchaser at a sale of land for city taxes

to foreclose his lien given by the tax deed, as provided by Sec. 1144 of the Code of 1860, and Secs. 503, 506 of the Code of 1851, where the tax deed is, by the charter of the city, made presumptive evidence of the regularity of the proceedings and sale, the burden of proof is on the defendant, land owner, to show otherwise, p. 258.

Cited in C. M. & St. P. Ry. Co., v. Hemenway, 117 Iowa, 601, 91 N. W. 911, involving a construction of Sec. 1444 of the Code of 1897, providing that a tax deed is presumptive evidence "that the real property conveyed was subject to taxation for the year or years stated in the deed."

4. Municipal Corporations—Tax Sale and Deed to Land—Deed Not Conclusive.—The recitals in a tax deed to land sold for city taxes is not conclusive of the fact that no tax was assessed or levied against the property, or that no sale was made, p. 259.

Reaffirmed in Case v. Albee, 28 Iowa 280.

Special cross reference. For further cases citing the text, and others, see annotations under Allen v. Armstrong (16 Iowa 508), Vol. II, p. 465.

HALLETT v. CHICAGO & NORTHWESTERN RY. CO., 22 IOWA 259, 92 AM. DEC. 393

1. Notary Public—Affidavit Sworn to Before Notary—Reference to Seal in Jurat—Amendment of Jurat.—The failure of a notary to refer to his seal in his jurat to an affidavit, if a defect at all, is one that can be amended by him at any time, pp. 260, 261.

Reaffirmed in Mundhenk v. C. I. R. Co., 57 Iowa 722, 723, 11 N. W. 658, holding that where a notary's jurat fails to refer to his seal, it may be amended by such officer to cure the defect.

Reaffirmed and extended in Jones v. Berryhill, 25 Iowa 294, holding further that (under Sec. 4011 of the Code of 1860, in reference to protest of notary to negotiable instruments being *prima facie* evidence, etc.) when a certificate or jurat is signed by a notary in his official character and his seal is impressed on the instrument or certificate, no reference to the seal is required.

BRAINARD v. VAN KURAN, 22 IOWA 261

1. Fraudulent Conveyance—Action in Equity to Set Aside by Judgment Creditor of Grantor.—A judgment creditor of a grantor in a fraudulent conveyance may, after levy and before sale under an execution, maintain an action in equity to set such conveyance aside as fraudulent, without first exhausting his legal remedies to obtain satisfaction of the judgment, p. 264.

Reaffirmed and explained in Worley v. Sheppard, 143 Iowa 5, 6, 121 N. W. 569, holding that the provisions of Secs. 3979-3989 of the

Code of 1897, in reference to attachment or garnishment by an unsecured creditor of a mortgagor, is not exclusive of the other rights and remedies of such a creditor, Sec. 3988 of such Code, as amended by Chap. 104, Acts of 1898, expressly so providing, and this being previously held in other cases.

2. Fraudulent Mortgage—Garnishment of Mortgagee by Creditor of Mortgagor.—A creditor of a fraudulent mortgagor may, instead of proceeding in equity to set it aside, attach as garnishee the fraudulent mortgagee, and thus subject the property in his hands, p. 266.

Reaffirmed and explained in Citizens' State Bank v. Council Bluffs Fuel Co., 89 Iowa 622-624, 57 N. W. 446, holding that although Chap. 117 of the Acts of Twenty-first General Assembly allows a creditor to levy upon personalty mortgaged, by attachment or execution by performing the conditions therein laid down, still, this does not prevent such a creditor from contesting the validity of a chattel mortgage alleged to be fraudulent, by garnishment proceedings against the agent of the mortgagee.

Reaffirmed, explained and extended in Davis v. Wilson, 52 Iowa 192, 3 N. W. 57, holding further that a mortgagee of a chattel mortgage who takes possession of the property and sells it, or who sells it under foreclosure proceedings, may be compelled to account for any overplus of proceeds after payment of the debt, either to the mortgagor (debtor) or his creditors; and that in such case any creditor of the mortgagor may subject the overplus by garnishment.

Reaffirmed and extended in Worley v. Sheppard, 143 Iowa 5, 6, 121 N. W. 569, holding further that where a judgment creditor of a fraudulent mortgagor proceeds under Secs. 3979-3989 of the Code of 1897, to subject mortgaged personalty by garnishment of the fraudulent mortgagee, and it appears that the mortgage was fraudulent, and that the mortgagee has sold or disposed of part of the property, judgment will be rendered against him for the value of the property sold: That the provisions of Secs. 3979-3989 of the Code of 1897, in reference to attachment by garnishment by an unsecured creditor of a mortgagor, is not exclusive of the other rights and remedies of such a creditor, Sec. 3988 of such Code, as amended by Chap. 104, Acts of 1898, expressly so providing, and this being previously held in other cases.

Cross references. See further on this question, annotations and cross reference under Campbell v. Leonard (11 Iowa 489), Vol. I, p. 848. See, also, Secs. 3979-3989 of the Code of 1897, and Chap. 104, Acts of 1898.

3. Appeal—Finding of Court Below Against the Evidence—Reversal, When.—Every presumption is to be indulged in favor of the finding below, and it must clearly appear that the verdict or finding

of the court is not sustained by the testimony, or the judgment will not be reversed on such ground, p. 266.

Special cross reference. For cases citing the text, and others, see annotations under Ackley v. Berkey (22 Iowa 226), ante. p. 22.

(Note.—There are a great many cases sustaining, but not citing, the text.—Ed.)

DYER v. HARRIS, 22 IOWA 268

1. **Foreclosure of Mortgage on Land—Purchaser at Sale Under—Rights of—Intervention by in Action to Foreclose.**—A purchaser of land at a sale under a foreclosure of a mortgage may (under Secs. 2930-2932 of the Code of 1860) intervene in the action to foreclose, to contest the rights of a person claiming an interest in the mortgaged property purchased, adverse to his rights or title, pp. 269, 270.

Reaffirmed and extended in Cooper v. Mohler, 104 Iowa 303, 73 N. W. 828, holding further that—under Sec. 2683 of the Code of 1873—the holder of one of several notes secured by a mortgage on land may intervene in an action to foreclose by the holder of the other note, and therein have rights of priority determined.

Cross reference. See further on this question, Secs. 3594-3596 of the Code of 1897.

OWEN v. OWEN, 22 IOWA 270

1. **Husband and Wife—Action at Law by Wife to Recover Money Judgment Against Husband.**—Whether a wife may, during coverture, sue her husband *at law* to recover a money judgment against him is not determined, p. 272.

Special cross reference. For cases citing the text, and many others on and intimately connected with the question, see annotations under Rules 2 & 3 of Logan v. Hall (19 Iowa 491), Vol. II, p. 752.

2. **Trial—Instructions—Duty of Judge to Give Although Not Requested.**—Upon a jury trial it is the duty of the judge, whether requested or not, to so instruct the jury that they will clearly and intelligently know the precise points which they are to decide; and his failure to so do, if resulting in prejudice to the substantial rights of or injustice to either party, will be reversible error, pp. 274, 275.

Reaffirmed in Hubbell and Bro. v. Ream, 31 Iowa 295, 296; State v. O'Hagan, 38 Iowa 506, 507; Johnson v. Miller, 63 Iowa 537, 538, 17 N. W. 38, 50 Am. Rep. 758; Gamble v. Mullin, 74 Iowa 100, 36 N. W. 910; Richardson v. Coffman, 87 Iowa 125, 54 N. W. 357; Ross v. Ross, 140 Iowa 61, 62, 117 N. W. 1109.

Reaffirmed and explained in Hines v. Whitehead, 124 Iowa 264, 99 N. W. 1064, holding that although no instructions be requested by counsel, it is the duty of the trial court to present to the jury the matters in issue as made by the pleadings.

Reaffirmed and explained in Overhouser v. American Cereal Co., 128 Iowa 586, 105 N. W. 116, holding that independent of any request made, the law of the case must be given to the jury, and a failure to do so will be reversible error.

Reaffirmed and explained in Kempe v. Bennett & Binford 134 Iowa 250, 111 N. W. 927, holding that the trial court must instruct the jury with reference to a party's theory thereof, if thereunder he would be entitled to recover upon proof of the essential facts.

Reaffirmed and explained in Capital City Brick & Pipe Co. v. City of Des Moines, 136 Iowa 254, 255, 113 N. W. 839, holding that the trial court is bound to see that in every case which goes to a jury they have clear and intelligent ideas of the points which they are to decide, and to this end should give necessary and proper instructions upon all the issues joined, whether they are requested by counsel or not; and that failure to instruct with reasonable fullness thereon is prejudicial error.

Reaffirmed and qualified in State v. Brainard, 25 Iowa 578, 580, (cited in dissenting opinion, 586) holding, however, that when the law is properly presented in instructions of counsel, the court is not bound to give a charge of his own.

Cited in State v. Hamilton, 32 Iowa 574, a case wherein nothing was decided on this subject because of an insufficient record upon the appeal.

Cited in Manuel v. C. R. I. & P. Ry. Co., 56 Iowa 657, 10 N. W. 238, the court holding that it is reversible error for the trial court to refuse to give an instruction asked by the defendant, directing the attention of the jury to the specific matters upon which plaintiff, in his petition, bases his right to recover.

Distinguished in Dixon v. Stewart, 33 Iowa 128, holding that when upon the trial of an action at law, the court gives an instruction which is not sufficiently explicit and does not develop the defense, it is the duty of the defendant to ask an instruction embodying his views of the case.

And see 149 Iowa 701, 127 N. W. 663.

(Note.—See further, Hall v. Cedar R. & M. C. Ry. Co., 115 Iowa 18, 87 N. W. 739; Upton v. Paxton, 72 Iowa 299, 33 N. W. 773; Kennedy v. Rosier, 71 Iowa 671, 33 N. W. 226; Seekel v. Norman, 71 Iowa 264, 32 N. W. 334; Hill v. Aultman, 68 Iowa 630, 27 N. W. 788; Potter v. C. R. I. & P. Ry. Co., 46 Iowa 399, some important cases sustaining and explaining, but not citing the text.—Ed.)

SANDERS v. CLARK, 22 IOWA 275

1. Appeal from Order Granting New Trial—When Supreme Court Will Reverse.—The order of the trial court in granting a new trial because the unsuccessful party was prevented by accident from interposing a defense, and for newly discovered evidence, will not

be disturbed upon appeal, unless it be clearly shown that the lower court abused his discretion in making such order, p. 277.

Special cross reference. For cases citing and sustaining the text, and many more on the question, see annotations under Rule 2 of McKay v. Thorington (15 Iowa 25), Vol. II, p. 298.

Cross reference. See further on this question, annotations and cross reference under Shepherd v. Brenton (15 Iowa 84), Vol. II, p. 308.

2. Timber—Contract for Sale and Removal of Standing Timber—Rights of Purchaser.—One purchasing standing timber to be removed within a specified time, takes no interest in the land, but acquires only a right of entry for the time specified, for the purpose of cutting and removing the timber therefrom: And at the expiration of the period allowed for such removal his right of entry ceases; and he cannot thereafter enter upon the land without being guilty of trespass, p. 278.

Reaffirmed, explained and qualified in Baker v. Kennedy, 145 Iowa 642, 124 N. W. 903, holding that a purchaser of standing timber to be cut and taken from land within a specified time acquires no interest in the land; and such a license may be established by parol evidence, because it conveys no interest in land, and the right to the timber which the licensee is authorized to remove becomes vested only when the trees are severed and converted into chattel property: But there may be an irrevocable license created in writing or provable by parol evidence on account of performance, or payment of consideration under our statute, which is an interest in land, and the right acquired under such a license is, in effect, an easement or right analogous thereto.

(Note.—See further, Agne v. Seitsinger, 85 Iowa 305, 52 N. W. 228; Melhop v. Meinhart, 70 Iowa 685, 28 N. W. 545; Walton v. Wray, 54 Iowa 531, 8 N. W. 350; Cook v. C. B. & Q. R. R. Co., 40 Iowa 451, some important cases in this connection, not citing the text.—Ed.)

TAYLOR v. ADAIR AND GOFF, 22 IOWA 279

1. Actions—Pleading and Practice—Who Can Intervene in Action.—In an action by the payee of a promissory note against the maker thereof, the party who *owns the debt* for which the note was given may (under Secs. 2930-2932 of the Code of 1860) intervene, and obtain judgment for the amount thereof *as evidenced* by the note, against the maker and debtor, and thus defeat recovery by the plaintiff, payee, pp. 282, 283.

Reaffirmed and varied in Cooper v. Mohler, 104 Iowa 303, 73 N. W. 828, holding that (under Sec. 2683 of the Code of 1873) the holder of one of several notes secured by a mortgage on land may

intervene in an action to foreclose by the holder of the other note, and therein have rights of priority determined.

Cited with approval in Hook, Adm'r v. Garfield Coal Co., 112 Iowa 217, 83 N. W. 966, the case turning on other questions.

Cited in Rice v. Savery, 22 Iowa 478, the court holding (as does the present case in argument) that one for whose benefit a contract is made may sue thereon, without making a party of the trustee who made it for him.

Cited in Green v. Marble, 37 Iowa 96, the court holding that the verbal assignment of a note and guaranty thereof, enables the assignee to sue on the guaranty in his own name.

Cited in Leach v. Hill, 106 Iowa 177, 76 N. W. 669, holding that either the party for whose benefit a promise or a contract is made, or the one in whose name it is made may sue thereon without joining the other.

Cross reference. See further on this question, annotations and cross references under Dyer v. Harris (22 Iowa 268), ante. p. 30.

2. Practice—Action on Wrong Docket—Waiver.—Under the Code of 1860, if an action is brought at law when it should have been brought in equity, or the converse, the error is waived, unless the defendant seasonably moves for the correction of the mistake, p. 281.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Rule 3 of Byers v. Rodabaugh (17 Iowa 53), Vol. II, p. 491; and see other rules thereof, and cross references there found.

Cross reference. See further on this question, Secs. 3426, 3427, and 3431-3437 of the Code of 1897.

STATE v. PARISH, 22 IOWA 284

1. Criminal Law—Indorsement of Names of Witnesses on Indictment—Statute not Applicable to Witnesses in Rebuttal.—The statute (Code of 1860) requiring the names of witnesses to be indorsed on the indictment, or notice to be given, before their introduction by the state upon the trial of an indictment, does not apply to witnesses introduced by the State in rebuttal, p. 286.

Reaffirmed in State v. Ruthven, 58 Iowa 123, 12 N. W. 236; State v. Rivers, 68 Iowa 615, 27 N. W. 783, holding that—under the Code of 1873—the state, in rebuttal, is not limited to the witnesses who were examined before the grand jury, or of whose introduction the prescribed notice has been given.

Cross reference. See further on this question, Secs. 5372 and 5373 of the Code of 1897.

2. Criminal Law—Trial of Indictment—What Is Rebuttal Testimony.—Rebuttal evidence is that which explains, repels, controverts or disproves facts given in evidence by the adverse party, p. 286

Reaffirmed in State v. Watson, 81 Iowa 384, 46 N. W. 869.

MORSE v. MARSHALL, 22 IOWA 290

1. Garnishment—Liability of Garnishee to be Affirmatively Shown—Liability on Answer Alone, when.—In order to charge a garnishee, his liability must be affirmatively shown; it will never be presumed.

If it be sought to make him liable on his answer alone, it must contain a clear admission of a debt due to, or possession of attached property of the defendant, p. 292.

Reaffirmed in Church v. Simpson, 25 Iowa 410; Streeter v. Gleason 120 Iowa 708, 95 N. W. 244.

Reaffirmed as to first paragraph in Williams Bros. v. Young, 46 Iowa 142.

Reaffirmed as to second paragraph in Victor v. Hartford Fire Ins. Co., 33 Iowa 216; Hibbard, Spencer, Bartlett & Co. v. Everett, 65 Iowa 373, 21 N. W. 684; Kerr v. Edgington, 106 Iowa 69, 70, 75 N. W. 669.

Reaffirmed and extended as to second paragraph in Thomas v. McDonald, 102 Iowa 566, 71 N. W. 572, holding that (under Sec. 3975 of the Code of 1897) the debt garnished must be in existence at the time of the garnishment, and not be incurred after the notice thereof, and must be such as might, in the absence of fraud, be enforced by the judgment defendant against the garnishee.

Cross references. See Rule 2 hereof. See further on this question, annotations under Smith, et al, v. Clarke, et al, (9 Iowa 241), Vol. I, p. 571.

See, also, in this connection, Secs. 3935-3953 of the Code of 1897.

2. Garnishment—Liability of Garnishee—Reasonable Doubt of Allows Judgment for.—If it be left in reasonable doubt whether a garnishee is liable, he is entitled to a judgment, p. 292.

Reaffirmed in Church v. Simpson, 25 Iowa 410; Kerr v. Edgington, 106 Iowa 70, 75 N. W. 669; Streeter v. Gleason, 120 Iowa, 708, 95 N. W. 244; Bolton v. Bailey, 122 Iowa 730, 98 N. W. 560.

Cross reference. See Rule 1 hereof.

GILLET v. EDGAR, 22 IOWA 293

1. Executions—Appraisement of Land Sold—Notice of Debtor to Sell Subject to Redemption, when Too Late.—Where a notice of a judgment debtor to have his land sold under execution subject to redemption as allowed by Sec. 3371 of the Code of 1860, is not filed until after levy, nor until two weeks after appraisement, it is too late, p. 295.

Reaffirmed in Davis v. Spaulding, 36 Iowa 613, 614, holding that such a notice filed ten days after levy of the execution, is too late.

Cross reference. See further on this question, Secs. 4041-4062 of the Code of 1897.

DAVENPORT *v.* ELLIS, 22 IOWA 296

1. Actions in Equity—Appeal—Trial De Novo—When not So Tried.—Upon an appeal in a chancery action tried below by evidence in writing according to the first method provided by Secs. 2999 and 3000 of the Code of 1860, where the record fails to show that it contains *all* the evidence adduced below, a trial *de novo* upon the facts will not be had.

A certificate of the clerk that the transcript contains "all of the evidence appearing on file," is insufficient, p. 297.

Reaffirmed in Grant *v.* Grant, 46 Iowa 480.

Reaffirmed as to first paragraph in Wetherell *v.* Goodrich, 22 Iowa 584.

Cross reference. See further on this question, annotations and cross reference under Anderson *v.* Easton & Son (16 Iowa 56), Vol. II, p. 406. See further Sec. 3652 of the Code of 1897.

MOORES *v.* ELLSWORTH, 22 IOWA 299

1. Mortgage—When Extinguished—Mortgagee Presenting and Having Claim Allowed Against Estate of Decedent Mortgagor—Effect.—A mortgage lien is not extinguished until the debt is paid; and the fact that a mortgage creditor or lien holder, presents his claim against a decedent's (mortgagor's) estate and has it allowed, does not bar his right to sue in equity and foreclose the lien, pp. 300, 301.

Special cross reference. For cases citing the text, and others, see annotations under Allen *v.* Moer, Adm'r (16 Iowa 307), Vol. II, p. 439.

HAMILTON *v.* DUBUQUE BRANCH OF STATE BANK, 22 IOWA 306

(Later Appeal, 25 Iowa 593, abstract.)

1. Trial—Instructions—Instruction Erroneous Standing Alone, but Corrected by Others.—The entire instructions and charge of the court must be considered together and as a whole; and although an instruction if considered alone may be erroneous, still, if as qualified and explained by others, it is correct and not misleading, the giving thereof is not reversible error, p. 311.

Reaffirmed in Hunt *v.* Ch. & N. W. R. R. Co., 26 Iowa 365, 366.

Reaffirmed and qualified in Brown *v.* Bridges, 31 Iowa 143, holding that if upon appeal it appears that the instructions given by the trial court, when considered together, do not contain a correct exposition of the law, or that they are conflicting, or tended to mislead the jury to the prejudice of the party appealing or complaining, the judgment will be reversed.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

WARREN v. CREW, 22 IOWA 315

1. Lands—Action of Right to Recover Possession—Equitable Title as Defense.—In an action of right to recover possession of real estate the defendant may plead as a defense, his equitable title under a contract of sale with the plaintiff's grantor, under which he, defendant, took possession of the property, and which he was at all times ready to perform, and of which the plaintiff had notice at the time he purchased, pp. 316, 317, 323.

Reaffirmed and extended in Adams County v. Graves, 75 Iowa 646, 647, 36 N. W. 891, holding further that in an action at law to recover the possession of real estate, the defendant may plead his prior equitable title under which he took and holds possession, as a complete defense, and obtain a decree therein quieting his title: And this is the rule although his claim for such affirmative relief in an independent action be barred by the statute of limitation.

2. Written Contracts—Parol Evidence—For What not Admissible—Parol Contemporaneous Agreement.—A parol contemporaneous agreement or condition is not admissible to vary, qualify or control the provisions and conditions of a written contract, p. 322.

Reaffirmed in Atherton v. Dearmond, 33 Iowa 355; *Mosnat v. Uchytel*, 129 Iowa 276, 105 N. W. 519.

Distinguished in Johnson v. Tantlinger, 31 Iowa 502, holding that in an action by the grantee of land against the grantor for conversion by the latter of crops growing on the land at the time of the conveyance, the defendant (grantor) may plead and prove, at least in mitigation of plaintiff's (grantee's) claim, that the specific crops were the produce of his labor, whereby they were brought from an immature to a mature condition, and that this labor was done with the plaintiff's knowledge and consent.—The court declining to decide whether growing crops will pass as realty under a deed to land.

Cross reference. See further on this question, annotations and cross references under Rule 4 of *Pilmer v. Branch of State Bank* (16 Iowa 321), Vol. II, p. 441.

HUDSON v. BLANFUS, 22 IOWA 323

1. Practice—Time in Which Petition to be Filed—Failure to So File—Effect.—Under Sec. 2813 of the Code of 1860, if the petition is not filed by the time named in the notice and ten days before the commencement of the term of the court wherein the action is pending, next succeeding, the action will be discontinued, p. 326.

Reaffirmed, explained and qualified in Cibula v. Pitt's Sons' Mfg. Co., 48 Iowa 529, under Sec. 2600 of the Code of 1873, corresponding to the section of the text: Holding that the rule is subject to no exception, unless the defendant waives non-compliance therewith.

Reaffirmed and qualified in Hildreth v. Harney, 62 Iowa 421, 422,

17 N. W. 585; *Rotch v. Humbolt College*, 89 Iowa 484, 56 N. W. 659, holding, however, that a judgment rendered upon a petition which was not filed within the time mentioned in the original notice is not void, or subject to collateral attack.

Distinguished in *Smith Bros. v. Shaw*, 49 Iowa 295, 296, holding that the fact that a defendant is personally served with an original notice after the date for filing the petition has passed, and after it is filed, does not affect the validity of the service.

(Note.—See further, *Oliver v. Davis*, 81 Iowa 287, 46 N. W. 1000; *Clark v. Stevens*, 55 Iowa 361, 7 N. W. 591; *Brown v. Mallory*, 26 Iowa 469, some important cases on this question not citing the text.—Ed.)

Cross reference. See further Sec. 3515 of the Code of 1897.

POLLARD *v.* BALDWIN, 22 IOWA 328

1. **Foreign Judgment—Action on—Defendant not Served in First Action a Defense Though Contrary to Judgment's Recitals—Burden of Proof.**—In an action on a foreign judgment the defendant may defend by showing that he was not in fact served with notice or process in the foreign action, although the foreign judgment entry recites that he was duly served; but in such case the defendant must make clear and satisfactory proof of such want of service, p. 332.

Reaffirmed and extended in *Dunlap & Co. v. Cody*, 31 Iowa 263, 7 Am. Rep. 129, holding further that in an action in this state on a foreign judgment, the defendant may plead and prove as a defense that the jurisdiction of his person by the foreign court, was obtained by the fraud of the plaintiff, his agent, or attorneys: Hence, holding that where defendant is induced to go to the foreign state by the false representations of the plaintiff's attorneys that a particular contract of work was to be let in his line of employment, and while there he was served with process in the plaintiff's action against him in such state, such facts constitute fraud and a complete defense to an action in this state on the foreign judgment thereon rendered.

Reaffirmed and extended in *Lowe v. Lowe*, 40 Iowa 223, 224, holding further that in an action upon a judgment of a sister state want of jurisdiction may be shown in the court, by proof contradicting the recitals or adjudication set out in the record.

Reaffirmed and extended in *Longueville v. May*, 115 Iowa 714, 87 N. W. 433, holding further that in an action in this state on a foreign judgment which is sufficient in form, the burden is on the defendant to prove every fact necessary to constitute it invalid.

Cited with approval in *Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa 600, 82 N. W. 1027, 82 Am. St. Rep. 529, holding that where a court of a foreign state acquires jurisdiction of the subject-matter and of the parties to an action, the peculiar procedure prevailing

there, is binding on the parties in an action in this state on the judgment there rendered.

And see 148 Iowa, 376, 126 N. W. 355.

Cross references. See further on this question, annotations under *Bryant v. Williams* (21 Iowa 329); *Rogers v. Gwinn* (21 Iowa 58); and *Harshey v. Blackmarr* (20 Iowa 161), Vol. II, pp. 911, 870, and 797, respectively.

RANSOM & CO. v. STANBERRY, 22 IOWA 334

1. Pleading—Estoppel Must be Specially Pled—Evidence.—Matters constituting estoppel must be specially pleaded, or evidence thereof is inadmissible, p. 336.

Reaffirmed in *Phillips, Adm'r v. Van Schaick & Wilcox*, 37 Iowa 237; *Folsom & Co. v. Star Union Line Fast Freight Line*, 54 Iowa 498, 6 N. W. 706; *Eikenberry & Co. v. Edwards*, 67 Iowa 19, 24 N. W. 572; *Independent Dist. of Burlington v. Merchants' Nat'l Bank*, 68 Iowa 348, 27 N. W. 257; *Spencer v. Papach*, 103 Iowa 517, 70 N. W. 749.

(Note.—See further sustaining, but not citing, the text, *Eggleston v. Mason*, 84 Iowa 631, 51 N. W. 1; *Glenn v. Jeffrey*, 75 Iowa 20, 39 N. W. 160.—Ed.)

DOUD v. WRIGHT, 22 IOWA 336

1. Appeal from Justice's Court—United States Revenue Stamp Affixed by Collector After Appeal Perfected—Effect.—Under the Act of Congress of 1865, where a United States Revenue Stamp is affixed to the appeal bond by the stamp collector after an appeal from a justice's court is perfected, it has the same effect as if affixed before; and the appeal will not be dismissed in such a case, pp. 337, 338.

Special cross reference. For cases citing the text, and others, see annotations under *Hugus v. Strickler* (19 Iowa 413), Vol. II, p. 743.

See, also, *Deskin v. Graham* (19 Iowa 553), Vol. II, p. 764.

GREELEY v. SAMPLE, 22 IOWA 338

1. Fraudulent Conveyances—Fraudulent Intent May be Established by Circumstances.—In an action in equity to set aside a conveyance as fraudulent, the fraudulent intent may be established by the facts and circumstances surrounding the transaction. The present case is an instance of the rule, pp. 339-342.

Cited in *Milliman v. Eddie*, 115 Iowa 533, 88 N. W. 965, the court holding that a voluntary confession of judgment for a debt which does not in fact exist, made with the fraudulent intent on the part of the parties thereto to hinder and delay creditors of the defendant, is fraudulent and void; and that an assignment of such judgment made in furtherance of such design, is equally void.

STATE *v.* CAVERS, 22 IOWA 343

1. Actions—Parties—Action May be Prosecuted in Name of a Nominal Party—Interference by Latter Not Allowed.—Where an action is allowed to be prosecuted in the name of a nominal party, it may be so prosecuted to final judgment in the lower and an appeal be taken to the Supreme Court in his name; and the nominal party is not allowed to interfere with the real parties in interest, in either court, pp. 345, 346.

Reaffirmed in Fries & Co. *v.* Porch, 49 Iowa 358.

2. County Seat—Election for—Duty of Board of Canvassers—Intention of Voters to Govern Ballot Counting.—Where in an election for the removal of a county seat, a place to which it is proposed to be removed has two names, one its technical and the other the one by which it is usually called, it is not improper for the board of canvassers to count the ballots cast for both under and as for the technical name of the place, pp. 347, 348.

Reaffirmed and explained in Hawes *v.* Miller, 56 Iowa 396, 397, 9 N. W. 308, holding that in canvassing votes of electors upon an election for the removal of a county seat, their intentions must be ascertained from their ballots, which must be counted to accord with such intentions: If the ballots express such intentions beyond a reasonable doubt it is sufficient, without regard to technical inaccuracies, or the form adopted by the voter to express his intentions: And of course the language of a ballot is to be construed in the light of all facts connected with the election.

3. County Seat—Election for Removal—Returns—Duty of Board of Canvassers—Extrinsic Circumstances or Informality as to Execution of Return Not to Be Considered, When—Mandamus.—The board of canvassers has no right to refuse to count the return from a township upon an election for the removal of a county seat because of informality or defectiveness in the execution of the return by the election officers, or because of extrinsic circumstances surrounding its execution, when such action and refusal on the part of the board will defeat the manifest will of the people. Upon such refusal the board may be compelled by mandamus, to count such return, pp. 348-351.

Special cross reference. For cases citing the text, and others, see annotations under State *ex rel.* Van Houten, *v.* County Judge of Hardin County (13 Iowa 139), Vol. II. p. 131.

WARREN *v.* MAYOR OF LYONS CITY, 22 IOWA 351

1. Municipal Corporations—Dedication to Public Use—Diversion From Use for Which Dedicated—Rights and Remedies of Dedicator—Power of Legislature.—Where land is dedicated to a city and the public for a particular purpose or use, it cannot be diverted there-

from by the city; and the dedicator may, in equity, enjoin and restrain its being so diverted.

The legislature has no power to authorize a city to divert, sell or dispose of any such property contrary to the use for which it was dedicated, and such a statute is unconstitutional, pp. 355, 356.

Reaffirmed, explained and qualified in Pettingill v. Devin, 35 Iowa 355-358, holding that land dedicated to a city for a particular use, can be used for it only; and the Dedicator, and even an abutting lot owner may enjoin and restrain a diversion to any other use or purpose resulting in injury to him; but that if such land is so diverted, it does not hereby revert to the Dedicator.

Reaffirmed and extended in Ransom v. Boal, 29 Iowa 70, 4 Am. Rep. 195, holding further that real property dedicated to a city for a particular use cannot be sold under execution to satisfy its debt.

Reaffirmed and extended in Cook v. City of Burlington, 30 Iowa 101, 106, 6 Am. Rep. 649, the court holding that where accretions are caused by a river to the soil of a street, etc., dedicated under the Act of Congress of July 2, 1836, and March 3, 1837, it is held by the city for public use, and cannot be conveyed by the city for private purposes; but that a railroad may be granted a right of way over such land acquired by accretion, by the city; and this without payment of damages to the adjoining lot owner: That land becoming part of a street or other public way, by accretion, partakes of the same nature and is held by the same tenure as the land of which it becomes a part.

Cited in Williams v. Carey, mayor, 73 Iowa 196, 197, 34 N. W. 814, the court holding that injunction will not lie in favor of an abutting owner against a city to prevent it from vacating twelve feet of a street, where the street so vacated or narrowed is forty-one feet wide, and no material damage is shown as resulting to such abutting lot owner.

Cited in McLachlin v. Town of Gray, 105 Iowa 262, 74 N. W. 774, the court holding that in the absence of fraud or bad faith, injunction does not lie in favor of an abutting lot owner to restrain a city from vacating a part of a highway within its limits; that in such case the lot owner's remedy is by *Certiorari*.

Cited in Long v. Wilson, 119 Iowa 269, 93 N. W. 282, 97 Am. St. Rep. 315, 60 L. R. A. 720, the court holding that injunction lies in favor of an abutting lot owner to enjoin and restrain another from interfering with his free access and use of the street, or to prevent its obstruction; and that such lot owner is not bound by a decree in an action to which he was not a party concerning the subject-matter.

Cited in State v. Des Moines City Ry. Co., 135 Iowa 714, 109 N. W. 875, holding that an abutting lot owner may, under Title 21, Chap. 9 of the Code of 1897, proceed by *Quo Warranto* to test the right of a

city railway to use a street, when the county attorney upon demand neglects or refuses to commence the proceedings.

Distinguished in Gray v. Iowa Land Co., 26 Iowa 391; Stubenrauch v. Neyenesch, 54 Iowa 568, 7 N. W. 1, holding that when empowered by its charter, or under general law, if incorporated thereunder, a city may vacate or narrow its streets, when the power is reasonably exercised and does not injure abutting lot owners.

Cross reference. See in this connection, annotations under Milburn v. City of Cedar Rapids, and Ch. I. & Neb. R. R. Co. (12 Iowa 246), Vol. II, p. 40.

BLAKE v. McMILLEN, 22 IOWA 358

(Later Appeal, 33 Iowa 150.)

1. Bills and Notes—Negotiable Instruments—Presentment to Joint Makers—Liability of Indorser.—The presentment for payment to only one of two joint makers of a negotiable note is not sufficient to charge an indorser thereof, unless a legal excuse for the failure to present to the other maker be shown, p. 360.

Reaffirmed and extended in Bank of Red Oak v. Orvis, 40 Iowa 332; Closz & Michelson v. Miracle, 103 Iowa 200, 72 N. W. 503, holding further that presentation to and demand of payment of one of two or more joint makers of a negotiable note is insufficient to charge an indorser.

THOMPSON v. DICKERSON, 22 IOWA 360

1. Officers—Liability of Sureties on Official Bond—Prior Misappropriation by Principal.—Where an official bond of a public officer is not retrospective in character, the sureties thereon are liable for the misappropriation by their principal of public moneys in his hands at the time of its execution and subsequently thereto, but not for prior misappropriations or delinquencies of such officer, p. 362.

Special Cross reference. For cases citing, sustaining and qualifying the text, and others on the question, see annotations under Rule 3 of Mahaska County v. Ingalls, Ex'r (16 Iowa 81), Vol. II, p. 410.

KINCELL v. FELDMAN, 22 IOWA 363

(Later Appeal, 28 Iowa 497.)

1. Resulting Trust in Real Estate—Parol Evidence to Establish—Sufficiency of.—Where it is sought by parol evidence to establish a trust in real estate as against the holder of the legal title, the proof must be clear and conclusive, p. 363.

Special Cross reference. For cases citing, sustaining, etc., the

text, and many others, see annotations under Rule 2 of *Cooper v. Skeel* (14 Iowa 578), Vol. II, p. 288.

STATE *v.* WILSON, 22 IOWA 364

1. Criminal Law—Adultery—Evidence—Proof of Marriage—

Instructions.—Upon the trial of an indictment for adultery the testimony of either the husband or wife as to the fact of the marriage, together with proof of continued cohabitation by them as such, raises a presumption of the fact of a legal marriage, which must be rebutted or disproved by accused; and an instruction to this effect in such case is proper, pp. 365, 366.

Reaffirmed in *Kilburn v. Mullen*, 22 Iowa 503, in an action by a husband for damages for criminal conversation or the alienation of his wife's affections.

Reaffirmed in *State v. Nadal*, 69 Iowa 482-484, 29 N. W. 453, in a criminal prosecution for bigamy.

Reaffirmed and explained in *State v. Rocker*, 130 Iowa 244, 106 N. W. 647, holding that the law will presume a legal marriage in the absence of other evidence, where it is shown that the parties have held themselves out to the world as husband and wife and have lived and cohabited together as such.

Reaffirmed, explained and extended in *Smith v. Fuller*, 138 Iowa 95, 115 N. W. 914, 16 L. R. A. (New Series) 98, holding further that the fact of a marriage may be established by direct testimony of eye witnesses, by testimony of one of the contracting parties, by admissions and confessions of the parties while living together, by testimony as to cohabitation and repute during the time the parties are living together, and by other recognized legal testimony.

Reaffirmed, extended and explained in *Casley v. Mitchell*, 121 Iowa 97, 98, 96 N. W. 726, holding further that whenever the fact of a marriage is involved, record evidence thereof is not required, but it may be proved by any kind of competent evidence, either direct or circumstantial: Holding, therefore, that proof that a man and woman immediately after their reputed marriage, commenced to cohabit as such, continued to do so for several years, during which period children were born to them, sufficiently establishes their marriage.

Cross reference. See further on this question, annotations under Rule 2 of *State v. Williams* (20 Iowa 98), Vol. II, p. 782.

2. Adultery—Indictment for—Complaint of Injured Consort.—

An indictment for adultery can only be returned—under the Code of 1860—upon the complaint of the injured husband or wife. But upon the complaint of the injured consort of an adultery committed by the other with an unmarried person, the grand jury may indict either or both of the guilty parties, p. 367.

Reaffirmed and extended in *States v. Maas*, 83 Iowa 470, 49 N. W. 1038; *State v. Andrews*, 95 Iowa 453, 455, 64 N. W. 405, holding

further that proof that a prosecution for adultery was commenced by the injured husband or wife is admissible, without such fact being averred in the indictment.

Special Cross reference. For further cases citing, sustaining and explaining the text, and others, see annotations under *State v. Roth* (17 Iowa 336), Vol. II, p. 535; and see cross references there found.

Cross reference. See further in this connection, Sec. 4932 of the Code of 1897.

PAUP AND HUSBAND *v.* SYLVESTER, ADM'R, 22 IOWA 371

1. Decedent's Estate—Property Set Apart to Widow—Right of Widow and Children.—Property set apart to a widow under Sec. 2361 of the Code of 1860, does not become hers absolutely; but if it is no longer needed and used by her for the purposes therein contemplated, it falls into the general personal estate, and becomes liable, not to pay debts, but for distribution according to law: But a child of the decedent, husband, cannot after attaining majority and marrying maintain an action against the widow for the possession of the value of the exempt property. Such property is exempted, under such section, for the benefit of both the widow and of the decedent's children while they remain at home, pp. 376, 377.

Special Cross reference. For cases citing and explaining the text, see annotations under *Gaskell v. Case* (18 Iowa 147), Vol. II, p. 600.

Cross reference. See further in this connection, Sec. 3312 of the Code of 1897.

MOOMEY *v.* MAAS, 22 IOWA 380, 92 AM. DEC. 395

1. Res Adjudicata—Former Judgment Binding to Extent of Relief Prayed for—Action to Foreclose Mortgage on Land in which Wife did not Join—Effect on Dower.—A judgment only concludes the parties to the action to the extent that it is consistent with the relief prayed for in the pleading, or issue on which it was rendered.

So a decree and sale thereunder in an action to foreclose a mortgage on land in which the wife did not join, does not affect the dower right, although she is made a party to the action, when her right to dower is not put in issue in the action to foreclose, pp. 383, 384.

Reaffirmed and qualified in *Mead v. Mead*, 39 Iowa 31, holding—as does the present case in argument—that where the wife joins in a mortgage of her husband on land, she is barred of her right to dower, by foreclosure and sale thereunder, made after the death of her husband: And that this rule applies to a sale of such land by the administrator of the decedent, husband, in pursuance of the order of the court.

Special Cross reference. For further cases citing, sustaining and distinguishing the text, and others, see annotations under Rule 1 of *Standish v. Dow* (21 Iowa 363), Vol. II, p. 915.

2. Actions—Original Notice—Defective Service on Minors—Collateral Attack of Judgment.—Where minors are personally served with original notice, then, although a return thereon may be so defective as to authorize a reversal of a judgment rendered thereon upon an appeal, still it will not render the judgment void upon collateral attack, a guardian *ad litem* having been appointed in the first action for the infants, and having answered for them, pp. 384, 385.

Reaffirmed and explained in *Myers v. Davis*, 47 Iowa 329, 330, holding that where the service of original notice is insufficient only in the manner of making it, it must be corrected by motion; and if the trial court rules incorrectly thereon, a judgment thereafter rendered will be reversed upon appeal.

Reaffirmed and explained in *Cummings v. Landes*, 140 Iowa 84, 117 N. W. 24, holding that when an original notice is so wanting in the requirements of the statute as to constitute *no notice* when served, the court is without jurisdiction even to appoint a guardian *ad litem*; and that service of an original notice after the date fixed for the defendant to appear and answer, is *no notice*, and all proceedings thereunder are void.

Reaffirmed and extended in *Day v. Goodwin*, 104 Iowa 380, 381 73 N. W. 866, 65 Am. St. Rep. 465, holding further that the rule is equally applicable to service of an original notice on an insane person; and that in such case although the notice or its service be irregular and insufficient, a judgment rendered thereon is not void or subject to collateral attack.

Distinguished in *Dohms v. Mann*, 76 Iowa 726, 39 N. W. 825, an action to foreclose a mortgage on an infant's land, wherein the return of the officer showed neither actual or constructive service of notice, or a substitute therefor, and no defense was made for him by his guardian, the court holding the judgment to be void under such circumstances, both upon direct and collateral attack.

Unreported citations, 48 N. W. 730; 94 N. W. 572; 124 N. W. 358.

Cross references. See further on this question, annotations under *Allen v. Saylor* (14 Iowa 435); Rule 2 of *Bonsall v. Isett* (14 Iowa 309), Vol. II, pp. 262 and 242, respectively.

3. Executions—Levy on Land under before Return Day, Sale after is Valid.—If an execution be levied upon land before the return day thereof, a sale thereunder may—under the Code of 1860—lawfully be made after that time, p. 386.

Special Cross reference. For cases citing and sustaining the

text, and others, see annotations under Rule 2 of *Butterfield v. Walsh* (21 Iowa 97), Vol. II, p. 876.

LUCORE, ADM'R *v.* KRAMER, 22 IOWA 387

1. Executors and Administrators—Action on Note of Decedent—Set-off.—Where an administrator sues in the district court on a promissory note of his decedent, the defendant (maker) may plead a set-off existing against the decedent at the time of his death, and without obtaining the consent or leave of the county court therefor, p. 388.

Reaffirmed and explained in *Wikel v. Garrison*, 82 Iowa 455, 48 N. W. 803; *Smeaton v. Cole*, 120 Iowa 371, 94 N. W. 910, holding that a claim in the hands of an administrator is subject to the same defenses as existed against it in the hands of his decedent.

Reaffirmed and extended in *Ware, Adm'r, v. Howley*, 68 Iowa 636, 27 N. W. 791, holding further that in an action on a note of his decedent by an administrator, the defendant (maker) may set-off a demand against the decedent *to the amount of the note sued on*, although such demand is barred as an independent claim by reason of the defendant failing to file and prove it against the estate as required by Sec. 2421 of the Code of 1873.

Cited with approval in *Van Sandt v. Dowes & Co.*, 63 Iowa 596, 19 N. W. 670, 50 Am. Rep. 759, holding that where a debtor has a right of set-off at the time of the assignment of the debt by his creditor, such right exists against the assignee.

PORTER *v.* THOMSON, 22 IOWA 391

(Case arising out of this controversy, 86 Iowa 175, 53 N. W. 108.)

1. Constitutional Law—Statutes—Title to Embrace only one Subject—What Included in.—Secs. 3274, 3275 of Chap. 125, Code of 1860, relating to what property of a city or other civil corporation is exempt from execution, the duty of municipal officers in meeting and finding means for the payment of judgments against the corporation, and fixing their personal liability for a failure to comply with such provisions, is properly included in an Act entitled "The Code of Civil Practice," and are not unconstitutional under Article 3, Sec. 29 of the Constitution of 1857, requiring that an Act shall embrace but one subject as covered by its title, pp. 393, 394.

Cited in *Cook v. Marshall County*, 119 Iowa 397, 93 N. W. 377, 104 Am. St. Rep. 283, the court holding that the constitutional inhibition mentioned in the text, does not require a construction forbidding the inclusion in one act of all matters germane to the main proposition or purpose sought to be effected, even though they are not specifically mentioned in the title: That if there is a "unity of object" in the various provisions and the general object is indicated

by the title, then, no matter how multifarious the provisions of the act, it sufficiently complies with the Constitution.

(Note.—There are many cases sustaining the principle of the text, and above citing case, not citing the text.—Ed.)

2. Municipal Corporations—Judgment Against—Personal Liability of Officers for Failure to Levy Tax to Pay, When.—Where the maximum rate of taxation allowed by law for any year is exhausted in order to pay necessary expenses of a city, the proper officers thereof are not required, upon demand, to levy a tax for that year for the purpose of paying a judgment against it; but when such a demand is once made they (the proper city officers) must thereafter and without further demand levy the tax of the succeeding year that the maximum tax rate is not exceeded for necessary expenses of the city, and, upon failure, are personally liable to the judgment creditor, pp. 395, 396.

Reaffirmed and extended in Boynton v. Dist. Township of Newton, 34 Iowa 514, 515, holding further that the drawing of an order by the president of a school district for a debt does not discharge it; and that upon the refusal of the officers of the district to thereafter levy a tax therefor, mandamus will lie.

Reaffirmed and qualified in Iowa R. R. Land Co. v. Sac County, 39 Iowa 135, 138, (cited in dissenting opinion, 140), holding that where the board of supervisors of a county levies the maximum rate of taxes for municipal purposes *and* an additional tax for the payment of a judgment against the county, the collection of the additional tax may be enjoined by a tax payer where property is sought to be sold therefor.

Cited in Iowa R. R. Land Co. v. Carroll County, 39 Iowa 163, the court holding that counties, cities and other municipal corporations may—under Chap. 87, Laws of 1872, amendment to Sec. 3275 of the Code of 1860—issue bonds in payment of a judgment, without submission of the question to a vote of the people.

And see 149 Iowa 4, not yet published.

Unreported citation, 127 N. W. 1014.

Cross references. See further on this question, annotations under Oswald v. Thedinga (17 Iowa 13); Coy v. City Council of Lyons City (17 Iowa 1.); State ex rel. Clark, Dodge & Co. v. City of Davenport (12 Iowa 335). Vol. II, pp. 481, 479, and 56, respectively.

LANE v. KREKLE, 22 IOWA 399

(Case involving the same facts, 27 Iowa 321.)

1. Bills and Notes—Negotiable Note Payable to Bearer—Payee a Fictitious Person—When no Defense against Bona Fide Holder.—In an action by a *bona fide* holder of a note payable to bearer against the maker, it is no defense that the payee named in the note was a

fictitious person, unless the defendant further avers and proves that the plaintiff took the note with knowledge of that fact, pp. 403, 404.

Cited in Gage v. Sharp, 24 Iowa 18, the court holding that the fact that a note payable to a payee or bearer is negotiated to another than and not to the payee, is not, of itself, sufficient to charge the taker with notice of a defect therein, as against the maker.

2. Bills and Notes—Negotiable Note Obtained by Fraud—Action by Holder—Burden of Proof and Facts to be Proved by Plaintiff.—In an action by the holder of a negotiable note when the defendant (maker) interposes the defense that it was obtained or procured by fraud, the burden is on the plaintiff to prove that he is a holder for value, and took before maturity and without notice, p. 406.

Reaffirmed and explained in Woodward v. Rogers, 31 Iowa 343; Bank of Monroe v. Anderson Bros. Mining & Ry. Co., 65 Iowa 701, 22 N. W. 934; Benton County Sav. Bank v. Boddicker, 105 Iowa 552, 75 N. W. 63, 67 Am. St. Rep. 310, 45 L. R. A. 321, holding that when the defense to a note is fraud in its inception, and such defense is supported by evidence, the *onus probandi* is thereby cast upon the holder who brings the action to show that he gave value for it, and that he is a *bona fide* purchaser before maturity.

Reaffirmed and extended in Rock Island Nat'l Bank v. Nelson, 41 Iowa 565, holding further that where fraud or illegality in the inception of a note is pleaded as a defense in an action thereon, and is supported by evidence, the burden of proof is cast upon the plaintiff to show that he is a *bona fide* purchaser before maturity.

Reaffirmed and extended in Commercial Bank of Essex v. Paddick, 90 Iowa 65, 57 N. W. 688; Skinner v. Raynor, 95 Iowa 539, 64 N. W. 602, holding further that the rule is applicable in an action by a holder of a note where the maker pleads and proves fraud, or want of consideration.

Reaffirmed and extended in Benton County Sav. Bank v. Boddicker, 105 Iowa 552, 75 N. W. 633, 67 Am. St. Rep. 310, 45 L. R. A. 321, holding further that the rule that where in an action by the holder of a negotiable note, fraud, or other illegality in the inception of the paper is pleaded and shown, the burden shifts to the holder to show that he is a *bona fide* holder for value, before maturity and without notice, is not affected by the fact that it is necessary for the defendant to negative such fact by affirmative allegations in his answer, which answer and allegations are denied by the plaintiff, holder.

Reaffirmed and varied in Sillyman v. King, 36 Iowa 215, 216, holding that a grantee who seeks to shelter himself against the consequences of a fraud committed by his grantor, under the *bona fides* of his purchase, is bound to prove the payment of the consideration, as well as other facts which the shape of the case may require; that his

title is not derived alone from the conveyance to him, but from that as fortified by the *bona fides* of his purchase.

Reaffirmed and varied in Light v. West, 42 Iowa 141, holding that in an action against the holder of a tax title to land to set it aside on the ground of fraud and where the plaintiff establishes the fraud by proof, the burden is on the defendant, holder of the title, to prove that he took it for value, in good faith, and without notice of the fraud.

Reaffirmed and varied in Starr Bros. v. Stevenson & Leonard, 91 Iowa 692, 60 N. W. 220, holding that the rule is applicable in an action to recover possession of personal property alleged to have been fraudulently sold, and against a person claiming it as purchaser; and that in such case the allegation in the petition that such purchaser had notice of and participated in the fraud, does not change the rule.

Distinguished in First Nat'l Bank of Dubuque v. Getz, 96 Iowa 141, 142, 64 N. W. 800, holding that the rule is inapplicable in an action by the holder of a promissory note against the maker, unless the fraud was in the inception of the note; and that the defendant, maker, averring any other fraud must prove his allegations.

3. Pleading—Demurrer—Interrogatories and Their Answers Do Not Aid Pleading Demurred to.—Interrogatories and their answers do not aid a pleading which is demurred to, and which, but for them, is defective, p. 407.

Reaffirmed and varied in Van Norman v. Modern Brotherhood of America, 134 Iowa 579, 111 N. W. 993, holding that interrogatories and their answers are no part of the pleadings in which they are propounded; and that a motion to transfer to equity in such an instance is to be considered with reference to the pleadings, exclusive of interrogatories and their answers.

LEA v. ROADS, 22 IOWA 408

1. Appeal—Insufficient Bill of Exceptions—Verdict Against Evidence—Affirmance.—Unless the bill of exceptions shows that it contains all of the evidence adduced below, the Supreme Court will not reverse because the verdict was against the evidence. A bill of exceptions which shows that it contains, or is certified as containing only "substantially all" of the evidence, is insufficient to justify a reversal on such above ground, p. 409.

Reaffirmed in McKenzie, Adm'x v. Kitter, 27 Iowa 256; Jemmison v. Gray, 29 Iowa 550.

Reaffirmed and extended in Davis & Atlee v. Card, 33 Iowa 593, (abstract), holding further that questions involving evidence will not be reviewed by the Supreme Court unless the bill of exceptions is certified as containing *all of the evidence* introduced below; and a bill purporting to contain *the substance* thereof, is insufficient for such purpose.

Reaffirmed and varied in Roe v. Wilmot, 51 Iowa 690, 2 N. W. 540, holding that where, upon an appeal in an equity cause, the ab-

strat purports to contain "all the evidence bearing upon and introduced to sustain the issues and findings as to which the plaintiff appeals," it is insufficient to justify a trial *de novo* in the higher court.

Cross references. See further on this question, annotations under *State v. Lyon* (10 Iowa 340), Vol. I, p. 700. See, also, Secs. 4107, 4118, 4122, 4123, 4139, of the Code of 1897.

CRUM, TREASURER, *v.* COTTING, 22 IOWA 411

1. Taxation and Revenue—Tax Sale of Land—Nature of Title Acquired by.—The holder of a tax deed to land takes a new title derived from the sovereign power under which the tax was levied, and does not succeed thereunder and thereby to the equities of the previous owner, pp. 415, 418.

Reaffirmed in *Bellows v. Litchfield*, 83 Iowa 43, 48 N. W. 1064.

Reaffirmed and extended in *Lucas v. Purdy*, 142 Iowa 364, 367, 369, 120 N. W. 1065. 19 Am. & Eng. Ann. Cas. 974, holding that a valid tax deed to land vests the tax purchaser with a new and complete title in the land under an independent grant from the sovereign authority which bars or extinguishes all titles and incumbrances of private persons, and all equities arising out of them; and that such deed divests the inchoate right of dower therein of the previous owner's wife.

Cited in *Harper v. Sexton*, 22 Iowa 445, the court holding that in an action to set aside a tax deed to land which is void on its face because showing that several tracts or parcels of land were sold in a bulk for a gross sum, equity will not decree, as against the land owner, plaintiff, that the county execute a new and valid deed to the tax purchaser, the taxes being grossly less than the value of the land.

Cited in *Walton v. Gray*, 29 Iowa 442, holding that where the taxes are paid by the owner of land before it is sold therefor, the tax sale and deed thereunder conveys no title.

Cited in *Butterfield v. Walsh*, 36 Iowa 538, not in point.

Distinguished and narrowed in *Bibbins v. Polk County*, 100 Iowa 497, 498, 69 N. W. 1008, holding that a lien on land for taxes due on personal property is inferior to the rights of a holder of a prior mortgage lien on the land; and that where the land is sold for such taxes, the tax purchaser takes subject to such prior mortgage lien, and the mortgagee is not required to redeem from the tax sale.

2. Land Mortgaged to Secure Debt to School Fund—Tax Sale of—Rights and Remedies of Tax Purchaser.—A tax purchaser of land mortgaged to secure a debt to the school fund takes as against such mortgage—under Sec. 811 of the Code of 1860—only the interest of the owner or mortgagor of the fee simple title, or the fee simple title subject to the right to redeem from the mortgage, to which lien his rights and title are subordinate, pp. 415, 422, 423.

Cited in *Miller v. Gregg*, 26 Iowa 76, 77, holding that where land

incumbered by a mortgage to the school fund and another mortgage to a third person is sold for taxes, the county authorities have no power, under the Code of 1860, or Chap. 148, Acts of 1862, to buy in such tax title and thereby defeat or cut off the lien of a third person's mortgage.

Special cross reference. For further cases citing, sustaining, etc., the text, and others, see annotations under Jasper County for use etc. v. Rogers (17 Iowa 254), Vol. II, p. 523.

3. Lis Pendens—Purchaser of Land at Tax Sale Pending Action.—A purchaser of land at a tax sale which is made pending an action to foreclose a mortgage thereon is charged with notice of and is bound by the proceedings therein, p. 424.

Reaffirmed in Comstock v. City of Eagle Grove, 133 Iowa 602, 111 N. W. 55.

Reaffirmed and extended in Stahl v. Roost, 34 Iowa 477; Jackson v. C. M. & A. Ry. Co., 64 Iowa 295, 20 N. W. 443, holding further that a purchaser of land, or any interest therein or easement over it, pending an action against his grantor involving the title thereto is charged with notice of and is bound by all proceedings therein.

Cross reference. See further on this question, annotations under Rule 4 of Cooley v. Brayton (16 Iowa 10), Vol. II, p. 394.

ROBINSON v. ROBINSON, 22 IOWA 427

1. Land—Resulting Trust in—When.—If land is purchased by one with money furnished by another, an implied or resulting trust arises, and the former becomes a trustee for the latter. And it is also conceded that the party setting up the trust in such case has the burden of proof, and he must establish it by evidence which is clear, satisfactory and conclusive, and not by loose and random conversations, p. 431.

Reaffirmed in Burkhardt v. Burkhardt, 107 Iowa 374, 77 N. W. 1071; Zunkel v. Colson, 109 Iowa 697, 81 N. W. 175.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

Cross references. See Rule 2 hereof. See further on this question, annotations under Rule 2 of Cooper v. Skeel (14 Iowa 578), Vol. II, p. 288.

2. Resulting Trust—Guardian and Ward—Guardian Without Authority Allowing Money of Ward to be Invested in Land by Another—Rights and Remedies of Ward.—Where a guardian, without authority, allows money of his ward to be invested by another in land, the latter taking the title, the ward may, at his election, proceed against the guardian for the amount invested, or may follow the money into the land, pp. 431-433.

Reaffirmed, explained and extended in Easton v. Somerville, 111

Iowa 172-174, 82 N. W. 477, 82 Am. St. Rep. 502, holding that a guardian cannot lend the money of his ward, lease his land, or invest his funds without an order of court; that such transactions made without the order or direction of the probate court are at least voidable until approved by the court, and the trustee is liable to the *cestui que* trust for the amount of such funds so illegally invested: That a person receiving such funds holds them in trust for the ward; and the ward may sue both the guardian and the person receiving the funds. therefor.

3. Evidence—Declaration of Deceased Person Against Interest.—When and Against Whom Receivable.—Declarations of one while in possession of land in disparagement of his title, or explanatory thereof, are receivable in evidence after his death against those claiming the land through or under him, or claiming an interest in or lien upon it as the property of the declarant, p. 433.

Reaffirmed and extended in Finch v. Garret, 102 Iowa 386, 71 N. W. 430, holding further that declarations of one while in possession of land in disparagement of his title, is admissible against one claiming through or under him who is not an innocent, good faith purchaser, although the declarant be living.

Reaffirmed and extended in Walter v. Brown, 115 Iowa 364, 88 N. W. 833, holding further that declarations of one while seized of land and in disparagement of his title are admissible against his privies.

Cross references. See further on this question, annotations under Rule 2 of Taylor v. Lusk (9 Iowa 444); Ross v. Hayne (3 G. Greene 211), Vol. I, pp. 604, and 95, respectively.

STATE v. SHANNEHAN, 22 IOWA 435

1. Criminal Law—Admission by State of Witness' Statements in Affidavit for Continuance—Impeachment by Contradictory Statements, Not Allowed.—Where an affidavit is read in a criminal prosecution as the testimony of an absent witness, the State cannot introduce evidence to show that such witness has made previous inconsistent statements, p. 437.

Reaffirmed and extended in Williamson v. Peel, 29 Iowa 459, holding further that the rule is equally applicable in civil actions.

Cited in Martin v. Orndorff, 22 Iowa 506, the court holding that it is reversible error for counsel to read as part of his argument to the jury, the notes of testimony introduced on a former trial.

Cited in Hibbard, Spencer, Bartlett & Co. v. Zenor, sheriff, 82 Iowa 509, 49 N. W. 64, the court holding that a witness may be impeached by previous contradictory statements appearing in the transcript of a stenographer of a previous trial of the same case, on file and made part of the record in the case, such witness' attention being specifically called thereto while he is testifying.

Cross reference. See further on this question, annotations under Rule 2 of *Samuels v. Griffith* (13 Iowa 103), Vol. II, p. 125.

HARPER *v.* SEXTON, 22 IOWA 442

1. Tax Deed to Several Parcels of Land Showing on Face That They Were Sold in Gross for Lump Sum—Effect.—Where a tax deed to several parcels of land shows on its face that they were sold in a lump for a gross sum, it is void, p. 445.

Special cross reference. For cases citing, sustaining, etc., the text, and many others, see annotations under *Boardman v. Bourne* (20 Iowa 134), Vol. II, p. 791.

2. Specific Performance—When Equity Will and When Will Not Decree—Void Tax Deed—New Deed Will Not Be Decreed to be Made.—Equity will decree a specific performance when the contract is in writing, is certain, is fair in all of its parts, is for an adequate consideration, and is capable of being performed, but not otherwise; and it will not interfere to decree a specific performance except in cases where it would be strictly equitable to make such a decree, nor where the contract is founded in fraud, imposition, mistake, undue advantage or gross misapprehension; or where, from a change of circumstances or otherwise it would be unconscientious to enforce it.

So where in an action to set aside a tax deed to land which is void on its face because showing that several tracts or parcels of land were sold in a bulk for a gross sum, equity will not decree, as against the land owner, plaintiff, that the county treasurer execute a new and valid deed to the tax purchaser, the taxes being grossly less than the value of the land, pp. 445, 446.

Reaffirmed as to first paragraph in Wilmer v. Farris, 40 Iowa 310.

Reaffirmed and explained in Moetzel & Muttera v. Koch, 122 Iowa 202, 97 N. W. 1081, holding that in order for a contract to be specifically enforced by a court of equity it must be not only fairly procured, but fair in itself.

Reaffirmed and explained in Robinson v. Luther, 134 Iowa 464, 109 N. W. 776, holding that it is a fundamental rule that specific performance rests in the judicial discretion of the chancellor, and that the remedy of specific performance will not be administered save upon an application that is based upon a valuable consideration; and that equity will not enforce the specific performance of a contract where compensation in damages will constitute adequate relief.

Reaffirmed and explained as to first paragraph in Parsons v. Gilbert, Hedge & Co., 45 Iowa 36, holding that where the vendor, at the time of a sale of land, is unable to convey a perfect title, but thereafter becomes able so to do, specific performance will not be decreed at his

instance, if the purchaser has sustained actual and serious injury by reason of his inability to so convey at the time of sale: Holding, therefore, that where realty is bought for immediate use by the purchaser, and the vendor is unable to convey a perfect title, whereupon the purchaser buys other real estate, that upon the vendor thereafter becoming able to so convey, he cannot obtain specific performance in equity.

Cited as to second paragraph in McCready v. Sexton & Son, 29 Iowa 379, 381 (cited in dissenting opinion, 416, 417), 4 Am. Rep. 214, the court holding that where a tax deed recites that several parcels or tracts of land were sold in a lump and for a gross sum, when they were in fact sold separately, the county treasurer who made the sale may thereafter make a deed or deeds to the tax purchaser correcting the mistake, and that the latter deed or deeds will be valid, under the Code of 1860, and conclusive that the tax sale was made in the *manner* required by law.

Cited as to second paragraph in Bulkley v. Callanan, 32 Iowa 466, the court holding that the treasurer has power to make a second deed *only* in case of an informal or insufficient execution of the first, in substantial compliance with the law and the sale of the land; and that when the treasurer makes a second tax deed when not allowed by law, or after making a valid one, the second is a nullity.

Cross reference. See further as to paragraph No. 1, annotations under Rule 3 of *Auter v. Miller* (18 Iowa 405), Vol. II, p. 656.

MCDOWELL, ADM'X v. LLOYD, 22 IOWA 448

1. Equity—Jurisdiction of Court Once Acquired Retained, Etc.

—A court of equity when it once acquires jurisdiction over the subject-matter and parties to an action for one purpose, will retain it for other purposes in order to secure complete equity and justice, p. 450.

Reaffirmed in Clayton County v. Herwig, 100 Iowa 633, 69 N. W. 1036.

Cross references. See Rule 2 hereof. See further on this question, annotations under *Franklin Ins. Co. v. McCrea* (4 G. Greene 229), Vol. I, p. 133.

2. Mortgage on Land to Secure Debt Payable in Installments

—Action in Equity to Foreclose for Installments Due—Practice.—

Where an action in equity is commenced to foreclose a mortgage on land for installments due, the debt being payable in installments, the court will retain jurisdiction of the cause, after entering a decree for those due, in order to enter a decree for the balance when they become due, pp. 450, 451.

Reaffirmed in Burroughs v. Ellis, 76 Iowa 650, 651, 38 N. W. 142, holding that the decree foreclosing the lien of a mortgage on land for the installments due, should expressly preserve the right to a lien for the installments not due.

Reaffirmed and qualified in Kilmer v. Gallaher, 107 Iowa 680, 78 N. W. 687, holding that a sale of all of the mortgaged premises, under a decree of foreclosure, for a part of the mortgage debt which is due, discharges the premises from the lien of the mortgage for the part of the debt not due and for which the decree does not provide; and that such a decree cannot provide that the sale it authorizes for the installment due, if made, shall be subject to a lien for the installments not due.

Reaffirmed and qualified in Wells v. Ordway, 108 Iowa 88, 89, 78 N. W. 806, 75 Am. St. Rep. 209, holding that unless the court retains jurisdiction of the case to provide for future installments, a sale of the mortgaged premises under foreclosure, passes to the purchaser all the title and interest of the mortgagor and mortgagee in and to the premises, and the purchaser takes free from the lien for the unpaid installments: And this rule applies where the mortgagee holds separate notes and mortgages.

(Note.—See further, Moody v. Funk, 82 Iowa 1, 47 N. W. 1008, 31 Am. St. Rep. 455; Hardin v. White, 63 Iowa 633, 19 N. W. 822; Harms v. Palmer, 61 Iowa 683, 17 N. W. 43; Todd v. Davey, 60 Iowa 532, 15 N. W. 421; Mickelwait v. Raines, 58 Iowa 605, 12 N. W. 622; Blake v. Black, 55 Iowa 252, 7 N. W. 557; Escher v. Simmons, 54 Iowa 269, 6 N. W. 274; Clayton v. Ellis, 50 Iowa 590; Powshiek County v. Dennison, 36 Iowa 244, some important cases sustaining, explaining, qualifying and narrowing, but not citing, the text.—Ed.)

WILSON v. CONKLIN, 22 IOWA 452

1. Execution Sale of Land—Redemption by Creditor Before Six Months—Who Can Object to or Complain of.—Where a creditor of a judgment debtor redeems from an execution sale of the latter's land within six months thereafter (the time allowed exclusively to the judgment debtor therefor by Sec. 3333 of the Code of 1860), no one but the judgment debtor, or the execution purchaser can object thereto, or complain thereof, p. 454.

Cited with approval in Kilbride v. Munn, 55 Iowa 447, 8 N. W. 905, the case turning on another point.

Cross reference. See further in this connection, Secs. 4045-4062 of the Code of 1897.

2. Execution Sale of Land—Purchaser of Certificate of Sale and Junior Judgment, Redemption From—Informal Redemption.—Where before the expiration of six months after a sale of land under a senior judgment, the holder of a second or junior judgment purchases and has assigned to him the certificate of sale under the senior and for the purpose of redeeming therefrom, then if the holder of a third judgment inferior to that of the second, desires to redeem, he must pay to the purchaser of the certificate and second judgment

holder, the amount of the bid and its interest, of the senior judgment sale, together with the amount of the second judgment, pp. 456, 457.

Reaffirmed and extended in Streeter v. First Nat'l Bank of Tama City, 53 Iowa 178, 179, 4 N. W. 916, holding further that the question of whether or not the purchase of a certificate of sale of land under a senior judgment by the holder of a junior judgment or lien is a purchase, or a redemption, is one of intention and fact.

Cited in Goode v. Cummings, 35 Iowa 72, the court holding that a judgment debtor or defendant may redeem his land from a sale under execution, by payment of the proper amount to the holder of the certificate of sale, whereupon he will be regarded as a redemption creditor; and that if, thereafter, and before the expiration of nine months from the date of sale, a junior judgment holder desires to redeem, he must redeem from such judgment debtor by payment of the amount due on the certificate of sale, with the amount of any other proper or superior liens held by him.

Cited in Goode v. Cummings, 35 Iowa 72; Fry v. Warfield, 105 Iowa 562, 563, 75 N. W. 486, the court holding that where a junior judgment or other lienholder redeems from a sale of land under a foreclosure and sale under a senior, within nine months after the date of sale, the affidavit required by Sec. 3118 of the Code of 1873 to be filed by the party redeeming, stating as nearly as practicable the amount still unpaid and due on his own claim, need not be filed.

Cited in West v. Fitzgerald, 72 Iowa 309, 33 N. W. 689, the court holding that redemption in all cases except where otherwise provided by statute, has the effect to discharge and satisfy the whole of the debt and lien under which it is made: Hence holding that where the holder of a junior mortgage on land whose debt is additionally secured by a chattel mortgage, redeems from a sale of the land under a foreclosure of a senior mortgage, more than six months but before nine months thereafter, and fails to cause to be entered upon the sale book "the utmost amount that he is willing to credit upon his claim," within ten days after the expiration of nine months from the day of sale—as provided by Sec. 3115 of the Code of 1860—such redemption and taking title and deed to the land thereunder, together with such failure, extinguishes the junior mortgage holder's mortgage on the land, his chattel mortgage, and the debt they were given to secure, as also the amount of the sale under the senior mortgage—And to the same effect is Jack v. Cold, 114 Iowa 356-358, 86 N. W. 377, citing the text.

Cited in Rush v. Mitchell, 71 Iowa 335, 32 N. W. 368, holding that where the holder of a minor judgment purchases and has the certificate of sale of land under a senior assigned to him before the issuance of the sheriff's deed thereunder, it is to be made to him by the sheriff.

Unreported citation, 27 N. W. 493.

Cross reference. See Rule 1. and cross reference to the Code of 1897 there found.

ONSTOTT v. MURRAY, 22 IOWA 457

1. Highway—Dedication—Evidence of—Use of and Acquiescence in by Land Owner—Prescription.—Long use of land as a highway and acquiescence therein by its owner, is evidence of dedication.

And if the public has claimed and continuously exercised the right of using land for a public highway for a period equal to that fixed by the statute for bringing actions of ejectment, the public's right to the highway as against such owner is complete, there being no proof that the road was so used by leave, favor or mistake, pp. 468, 469.

Reaffirmed in Wilson v. Sexon, 27 Iowa 15-17; Manderschild v. City of Dubuque, 29 Iowa 79, 83, 4 Am. Rep. 196; State v. Crow, 30 Iowa 259; Hougham v. Harvey, 33 Iowa 204; Kelsey v. Furman, 36 Iowa 616; Gear v. C. C. & D. R. R. Co., 39 Iowa 25; Mosier v. Vincent, 39 Iowa 609; State v. Schilb, 47 Iowa 613, 614; Gerberling v. Wunnenberg, 51 Iowa 126; Duncombe v. Powers, 75 Iowa 189, 39 N. W. 263; Casey v. Tama County, 75 Iowa 661, 37 N. W. 138; Sherman v. Hastings, 81 Iowa 375, 46 N. W. 1084; State v. Peeters, 97 Iowa 461, 66 N. W. 755; Hanger v. City of Des Moines, 109 Iowa 483, 80 N. W. 550; City of Cedar Rapids v. Young, 119 Iowa 554, 93 N. W. 567; Whetstone v. Hill, 130 Iowa 638, 639, 105 N. W. 193, some of these cases holding, also, that the provisions of Sec. 2031 of the Code of 1873, Sec. 3004 of the Code of 1897, apply to easements by prescription, not to those by dedication, and that the rule is not thereby abrogated.

Reaffirmed as to second paragraph in Ewell v. Greenwood, 26 Iowa 379.

Reaffirmed and explained in Mosier v. Vincent, 34 Iowa 479, 480; Baldwin v. Herbst, 54 Iowa 169, 6 N. W. 257, holding that a public road or highway may be proved to be such by the record establishing it, or by the written dedication made by the owner of the land, or by prescription.

Reaffirmed and explained in State v. Tucker, 36 Iowa 486, 487, holding that to establish a highway by prescription there must be an actual public use, general, uninterrupted, continued for the period of the statute of limitation, under a claim of right.

Reaffirmed, explained and qualified in State v. Birmingham, 74 Iowa, 410, 411, 38 N. W. 123, holding that to constitute a highway by prescription, the road must have been occupied and used by the public under a claim of right to it as a highway, with the knowledge of the owner of the land for a period of more than ten years: But the dedication may be shown by writing, by declaration or by conduct of

the land owner; and if he knows for a series of years that the public is using and treating a road as a highway, expending funds on its improvement, and he acquiesces therein, this is evidence of an actual dedication.

Reaffirmed and extended in City of Pella v. Scholte, 24 Iowa 293, 95 Am. Dec. 729, holding further that a right to land by adverse possession for the statutory period may be acquired, or lost, by the public in and to public realty—Applying this rule, as extended, to a public square of a city.

Reaffirmed and qualified in Daniels v. Ch. & N. W. R. R. Co., 35 Iowa 131, 132, 14 Am. Rep. 490, holding that no dedication of a highway, right of way or other easement will be presumed or established by user, except by proof of the continuous use thereof for the statutory period of ten years, with the knowledge and acquiescence of the owner of the land.

Cited in Murphy v. C. R. I. & P. Ry. Co., 38 Iowa 546 (dissenting opinion), the majority court opinion not in point, but one question therein being upon analogy.

Cross references. See Rule 3 hereof. See further on this question, annotations under Keyes & Crawford v. Tait (19 Iowa 123), Vol. II, p. 704; Rule 1 of Brown v. Jefferson County (16 Iowa 339), Vol. II, p. 443; Robinson v. Lake (14 Iowa 421), Vol. II, p. 259.

2. Highway—Dedication—Evidence of—Long Use of and Acquiescence in by Land Owner—Highway Over Wild or Uninclosed Land.—Where a road sought to be established by dedication of the owner of the land, or by prescriptive right of the public, is a mere neighborhood, local, or timber road, much stronger evidence is required than when it is a thoroughfare, or part of an acknowledged highway between towns, or leading to a town, and as such constantly traveled.

In cases of implied or presumed acquiescence or consent on the part of the owner, very much depends upon the location of the road, the amount of travel, the nature of the use by the public, the rights asserted by the public, the knowledge of the owner, and like circumstances, pp. 469, 470.

Reaffirmed in Hougham v. Harvey, 40 Iowa 636, a case wherein a highway over unimproved and vacant land was held not to be established by prescriptive use, or by dedication, it being a local or neighborhood road, the travel confined to no particular track or bed, and other similar circumstances.

Reaffirmed and extended in State v. K. C. St. J. & C. B. R. R. Co., 45 Iowa 144, holding further that use of the land alone, if it be wild and uninclosed timber or prairie, will not raise a legal presumption of notice to the owner of the occupation of his land; and that user alone, if uninclosed and wild prairie and timber land, will not support a prescription for a highway.

(Note.—Several cases under Rule 2 sustain this rule, and its extensions, in principle.—Ed.)

Cross reference. See Rule 1 hereof, in this connection.

RICE *v.* SAVERY, 22 IOWA 470 .

(Case Arising from Same Facts, 39 Iowa 258.)

1. Actions—Parties—Contract by One for Benefit of Another—Who May Sue—Real Party in Interest.—Under Sec. 2757 of the Code of 1860, one for whose benefit a contract is made may sue thereon without making a party of the trustee who made it for him. And under Sec. 2758 of the Code of 1860, the party in whose name a contract is made for the benefit of another may sue thereon without joining the party for whom it was made. In such a case, either the party beneficially interested, or the party in whose name the contract was made, may sue thereon, pp. 477, 478, 480.

Reaffirmed in Sypher *v.* Savery, 39 Iowa 261; Baker & Co. *v.* Bryan, 64 Iowa 566, 21 N. W. 85; Marsh & Co. *v.* Ch. R. I. & P. Ry. Co., 79 Iowa 336, 44 N. W. 563.

Reaffirmed and explained in Stringfield *v.* Graff, 22 Iowa 441, holding that where a judgment is rendered against a principal and his surety on a promissory note, the surety may sue alone, to obtain a cancellation thereof on the ground that it has been fully paid.

Reaffirmed and explained in Swan *v.* Yaple, 35 Iowa 250, holding that it is no defense to an action by a party holding the legal title to the cause of action, to show that another is the party beneficially interested: Nor will the fact that another person is the holder of the legal title, constitute a defense in an action by the party holding the beneficial interest.

Reaffirmed and explained in Goodnow *v.* Litchfield, 63 Iowa 279, 19 N. W. 228, holding that under Sec. 2544 of the Code of 1873, a trustee may prosecute an action in his own name on a chose in action held for his *cestui que* trust.

Reaffirmed and explained in Cassidy *v.* Woodward, 77 Iowa, 357, 42 N. W. 320, holding that, under Sec. 2544 of the Code of 1873, the party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue thereon in his own name.

Cited in C. R. I. & P. Ry. Co., *v.* City of Ottumwa, 112 Iowa 320 (dissenting Opinion), 83 N. W. 1081, 51 L. R. A. 763, the majority court opinion not in point.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others, see annotations under Rule 2 of Conyngham *v.* Smith (16 Iowa 471), Vol. II, p. 458.

Cross references. See further on this question, annotations under Rule 3 of Cottle *v.* Cole & Cole (20 Iowa 481), Vol. II, p. 849. See also Sec. 3459 of the Code of 1897.

RYERSON v. HENDRIE, 22 IOWA 480

1. Actions—Parties—Partnership—Action Against One Partner on Firm's Note.—Under Sec. 2764 of the Code of 1860, the holder of a note executed by a partnership may sue all or any of the members thereof thereon at his, plaintiff's option, pp. 482, 484.

Reaffirmed in Hosmer v. Burke, 26 Iowa 356.

Unreported citation, 121 N. W. 1039.

Cross reference. See further, in this connection, Sec. 3465 of the Code of 1897.

2. Actions—Parties—Parties Jointly Bound May Be Sued Severally.—Under Sec. 2764 of the Code of 1860, parties to every obligation who are jointly bound therein, whether their joint liability arises from the language of the instrument itself, or results from their previous relations to each other, are liable to be sued severally, p. 484.

Reaffirmed and extended in Redman & Fear v. Malvin & Cloud, 23 Iowa 299, holding further that in an action for damages arising out of the non-performance of a contract on which two parties were jointly bound, the action being brought by only one so bound, the defendant may plead a counterclaim for damages arising from the violation of such contract.

Reaffirmed and extended in Allen v. Maddox, 40 Iowa 125, holding further that persons jointly bound, either by contract or relationship, as partners, etc., may be severally sued; or such a demand may be the subject of set-off against any one so bound.

MCCORMICK & BRO. v. HOLBROOK, 22 IOWA 487, 92 AM. DEC. 400

1. Husband and Wife—Wife's Contract Relating to Her Separate Property, Valid—What Contract of Wife So Considered.—Under Sec. 2506 of the Code of 1860, a married woman is bound on her contract relating to her separate property or which purports to bind her only; and her husband is not liable thereon.

So where a married woman who is the owner of a farm, purchases a mowing machine to be used thereon, and by a written order which does not disclose her coverture, she is liable for the purchase price, pp. 489, 490.

Reaffirmed and extended in Mitchell v. Smith, 32 Iowa 487, 488, holding further that where a married woman who owns a farm and a great portion of the personalty thereon, and who resides on it with her children, buys a horse to be worked in cultivating and operating it, she is liable for its purchase price, although a note therefor be executed by both her and her husband.

Special cross reference. For further cases citing, explaining, etc., the text, and others, see annotations under Jones v. Crosthwaite (17 Iowa 393), Vol. II, p. 546.

Cross reference. See further on this question, annotations under Logan v. Hall (19 Iowa 491), Vol. II, p. 752.

2. Trial—Introduction of Evidence After Partial Argument—When Allowed—Discretion of Trial Court.—Under Sec. 3070 of the Code of 1860, a party may be permitted by the court to introduce evidence to correct an evident oversight or mistake, at any time before final submission of the cause.

So it is not reversible error for the trial court to allow the introduction of evidence for such a purpose after the argument of one of the counsel for the adverse party has been finished, p. 491.

Reaffirmed in Hill v. City of Glenwood, 124 Iowa 480, 100 N. W. 523, under the Code of 1897.

Cross reference. See further, Sec. 3719 of the Code of 1897.

STARR & RAND v. BOARD OF SUPERVISORS OF DES MOINES COUNTY, 22 IOWA 491

1. Court House—Submission of Question of Erection of to Vote of People—What to be Submitted—Powers of the County Board of Supervisors.—The powers of the county board of supervisors in relation to a submission of the question of the expenditure of county funds for the erection of a court house, to a vote of the people, is, under the Code of 1860, confined to the powers of the county judge in relation thereto, as given by the Code of 1851: And no election or vote on such a question is valid, unless a proposition to levy a tax therefor be submitted to the voters therewith, and be voted thereon at the same time and as part of the question, pp. 495-498.

Reaffirmed and explained in Reichard v. Warren County, 31 Iowa 387-389, holding that under the Act of March 22, 1860, the board of supervisors cannot order the erection of a court house, jail, poor-house, or other building, or a bridge, nor purchase real estate for county purposes, when the probable cost will exceed five thousand dollars (\$5,000) until a proposition therefor and the tax requisite therefor is first submitted to a vote of the people: And that any act of the board of supervisors or other county officers in excess of the authority conferred by such a vote, is void *ab initio*.

Cited in Cedar Rapids & Missouri Riv. R. R. Co. v. Boone County, 34 Iowa 51, the court holding that under Sec. 986 of the Code of 1860, the board of supervisors may submit to the voters at a special election, the question of the ratification of a contract to convey swamp lands to aid in the construction of a railroad.

Distinguished, explained and narrowed in Rock v. Rinehart, 88 Iowa 46, 47, 55 N. W. 24, holding that a proposition to erect a court house at a cost exceeding five thousand dollars to be paid for by levying taxes, is exclusively under Chap. 80, Acts of 1876, and is of no effect unless accompanied by a proposition to levy the necessary tax: But that a proposition submitted to the voters to erect a court house

at the cost of fifty thousand dollars, to be paid for out of the proceeds of a sale of the swamp lands of the county, contains but one object, and is valid, under Chap. 77, Acts of 1862.

Distinguished and narrowed in Miller v. Merriam, 94 Iowa 130-133, 62 N. W. 690, holding that—under the Code of 1873—before a board of supervisors can order the erection of a court house, the probable cost of which will exceed five thousand dollars, it must be authorized to do so by a vote of the electors of the county, and when there is money in the treasury available and sufficient to pay for the building, it is not necessary to submit to the people a provision to levy a tax; but when, in order to pay for the building, money must be borrowed, or a debt be incurred, then the question of borrowing the money must be submitted with the proposition to erect the building.

Cross reference. See further on this question, Secs. 443-456 of the Code of 1897.

KILBURN v. MULLEN, 22 IOWA 498

1. Trial—Evidence—Witnesses—Competency—Child of Tender Years.—Under Sec. 3978 of the Code of 1860, every person of sufficient capacity to understand the obligation of an oath is a competent witness in both civil and criminal cases, except as otherwise provided; but where upon the trial of an indictment a child nine years of age is offered as a witness, the presumption in favor of such capacity is not very strong in its favor, and the ruling of the trial court in refusing to allow it to testify, will not be ground for reversal, when the record does not affirmatively show it to have been possessed with the requisite capacity, pp. 500, 501.

Cited with approval in State v. Lugar, 115 Iowa 270, 88 N. W. 334, the court holding that where upon the trial of an indictment a witness called by the state gives damaging testimony against the accused without being sworn, and this fact is not discovered by the accused until after the verdict of conviction, it is a ground for a new trial, or for reversal upon appeal.

Cross reference. See further on this question, Sec. 4601 of the Code of 1897.

2. Trial—Evidence—Witnesses—Impeachment of Character—Specific Vice or Immorality.—Under Sec. 3997 of the Code of 1860, the general moral character of the witness may be proved, which evidence goes to his credibility; but evidence of particular acts of immorality, such as a want of chastity, are not admissible for such purpose, pp. 502, 503.

Reaffirmed and explained in State v. Seevers, 108 Iowa 741, 78 N. W. 706, holding that under Sec. 3649 of the Code of 1873, corresponding to the section of the text, the general moral character of a witness, or his general reputation as to morals, not his character or

life as known to the impeaching witness, may be shown, to go to his credibility; but that proof of specific acts of vice is incompetent.

Reaffirmed and extended in State v. Haupt, 126 Iowa 153, 101 N. W. 740, under Sec. 4614 of the Code of 1897, corresponding to the section of the text, holding further that the rule applies to an accused person who testifies for himself upon the trial of the prosecution against him: Holding further that upon the trial of a person for seduction, the previous character of the prosecutrix for chastity is in issue, and proof of her previous unchaste character is competent, and, if she testifies, additional proof of her general moral character is admissible, the latter to go to her credibility alone.

And see 148 Iowa 154, 126 N. W. 1109.

Unreported citation, 110 N. W. 277.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

Cross reference. See further, Sec. 4614 of the Code of 1897.

3. Evidence—Proof of Marriage.—The fact of a marriage may be proved by any one present at the ceremony; or the testimony of either the husband or the wife as to the fact of marriage, together with proof of continued cohabitation as such, raises a presumption of a legal marriage which must be rebutted or disproved, p. 503.

Special cross reference. For cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 1 of State v. Wilson (22 Iowa 364), ante p. 42.

4. New Trial—Newly Discovered Evidence—Refusal to Grant New Trial for by Trial Court—Want of Diligence to Discover—Affirmance on Appeal.—Where the trial court overrules a motion for a new trial based on the ground of newly discovered evidence, and the record upon appeal therefrom fails to show that the party moving therefor used adequate diligence to discover the evidence before the trial below, the judgment and ruling will be affirmed, p. 503.

Reaffirmed in Lay v. Wissman, 36 Iowa 307; Carman v. Roennan, 45 Iowa 136, holding that a motion for a new trial on the ground of newly discovered evidence, and affidavits in support thereof, must show new and independent evidence than that adduced upon the trial and that the party moving therefor used reasonable diligence to discover it before the trial, or the trial court's refusal to grant it will be affirmed upon appeal.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, Sec. 3755 of the Code of 1897.

MARTIN v. ORNDORFF, 22 IOWA 504

1. Trial—Misconduct of Counsel in Argument—Reading Minutes of Evidence of Former Trial is Error—Instruction Not to Consider Does Not Cure, When.—In his argument to the jury counsel has no right to read the minutes of evidence introduced upon a former trial, and this is reversible error, even though the court instructs the jury not to consider anything read from the minutes, unless the Supreme Court be satisfied that the verdict was so clearly right that such conduct of the counsel could not have reasonably affected the result, pp. 505, 506.

Reaffirmed and varied in Hall v. Ch. R. I & P. Ry. Co., 84 Iowa 316, 318, 51 N. W. 151, holding that an error in admitting improper evidence may be of so serious a nature as that the instructions of the court will not cure it; and that when, upon appeal, the record fails to show that no error resulted therefrom, but on the contrary leads the higher court to believe that prejudice resulted therefrom of such a serious character as to have changed the result, it will be reversible error.

Reaffirmed and varied in Flinders v. Bailey, 133 Iowa 617, 619, 620, 111 N. W. 28, holding that where upon the trial of an action by a husband for the alienation of his wife's affections, evidence of the good financial condition of the defendant is improperly admitted, over his objection, such error cannot be cured by instructions withdrawing the evidence from the consideration of the jury.

Distinguished and narrowed in State v. Helm, 97 Iowa 382, 383, 66 N. W. 752, holding that it is the general rule that evidence improperly admitted may be withdrawn from the jury, and the error thus cured, and that when an error occurs, and soon after a correction is made, the proper administration of justice does not require, unless it may be in extreme cases, that the court should grant a new trial because of the error—This case sustaining the general rule where improperly admitted evidence was withdrawn from the jury by a specific instruction of the court.

BURLINGTON GAS LIGHT CO. v. GREEN, THOMAS & CO., 22 IOWA 508
(Former Appeal, 21 Iowa 335; Later Appeal, 28 Iowa 289.)

1. Payment—Estoppel to Deny—Note Offered to be Transferred in Payment of Debt—Creditor Afterward Taking from Unauthorized Person as Collateral—Effect.—Where a debtor offers to transfer a note to his creditor *as a payment* of the latter's debt, but in no other way, and thereafter and in the absence and without the knowledge of the debtor, the creditor receives the note *as collateral security* from a person unauthorized to transfer or deliver it, such transaction operates as a *payment*; and the creditor cannot evade the effect thereof on the ground that the act of the unauthorized person was void, pp. 511, 512.

Reaffirmed and extended in Keck v. Hotel Owners' Mut. Fire Ins. Co., 89 Iowa 207, 56 N. W. 440, holding further that where a person indorses a draft and leaves it at a bank for collection, knowing at the time thereof that the instrument was tendered in full of a compromise of his claim against the drawer, and for no other purpose, he thereby accepts the compromise.

2. Principal and Agent—Ratification of Unauthorized Act—When one does an unauthorized act on behalf of another, and the latter, after obtaining knowledge thereof, fails to repudiate it, but instead assents thereto, he thereby ratifies it, and gives it the same effect as if done by previously conferred authority, p. 513.

Reaffirmed in Berryhill v. Jones, 35 Iowa 339.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

SMITH v. SMITH, 22 IOWA 516

1. Fraud—Judgment Cannot Be Collaterally Attacked for Fraud.—A judgment cannot be collaterally attacked for fraud in its procurement, p. 518.

Reaffirmed and qualified in Mahoney v. State Ins. Co., 133 Iowa 576-579, 110 N. W. 1043, 9 L. R. A. (New Series), 490, holding that a judgment cannot be collaterally attacked for fraud, unless that fraud be such as to render the judgment absolutely void: Hence holding that a judgment cannot be collaterally attacked for false testimony or for false written evidence, produced upon the trial of the action wherein the judgment was rendered, when both parties were before the court.

Cross reference. See further on this question, annotations under Rule 2 of Cottle v. Cole & Cole (20 Iowa 481), Vol. II, p. 849.

WILLIAMS v. HEATH, 22 IOWA 519

1. Evidence—Deed—Secondary Evidence of Contents—When Admissible.—Secondary evidence of the contents of a deed is—under Secs. 4001, 4002 of the Code of 1860—inadmissible to prove title, until the party offering it introduces proof that the original is lost, or that it does not belong to him, and is not within his control; and this rule applies to the introduction of the record of such deed, or a certified copy thereof, p. 521.

Reaffirmed in Ackley v. Sexton, 24 Iowa 321; Courtright v. Deeds, 37 Iowa 513, 514.

Reaffirmed and explained in McNichols v. Wilson, 42 Iowa 393, holding—under Sec. 3660 of the Code of 1873—that a party may introduce a record of a deed in evidence, when the original does not belong to him, and is not within his control, without resorting to a subpoena *duces tecum* for the production of the original.

Reaffirmed, explained and qualified in McCollister v. Yard, 90 Iowa, 633-636, 57 N. W. 452, holding that Secs. 659, 3660 of the Code of 1873, corresponding to sections of the text, and the rule of the text based thereon, applies only to instruments affecting real property; and that an instrument of the adoption of a child is not contemplated by or within the sections: But that before a party may introduce the record of such an adoption, he must show that the original is not in his possession, and that, in order to discover and produce it, he has in good faith exhausted in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.

Reaffirmed and extended in Byington v. Oaks, 32 Iowa 489, holding further that a copy of a deed is inadmissible when the original is in existence and on file in a case in the Supreme Court, and is procurable by the party offering the copy in evidence.

Cross reference. See further on this question, Secs. 4629 and 4630 of the Code of 1860.

2. Taxation and Revenue—Tax Sale of Land—When Purchaser at Acquires Title—Rights of Land Owner.—Where land is sold for taxes, the legal title does not—under Sec. 784 of the Code of 1860—pass out of the former owner, until a tax deed is made by the treasurer to the purchaser.

The owner of land sold for taxes may maintain ejectment against the purchaser thereof at the sale, who has received no tax deed, even after the statutory period for redemption has expired, pp. 523, 524.

Reaffirmed and explained in Eldridge v. Kuehl, 27 Iowa 174-177; Thornton v. Jones, 47 Iowa 399, holding that the striking off of real estate to the highest bidder at a sale for taxes, and the giving to him a certificate of purchase thereof, does not invest him with any *title to or interest in* such real estate, but simply a lien upon it for the taxes, interests, costs, penalties, etc.; and that the statute of limitation does not commence to run against the owner of the land sold and in favor of the tax sale purchaser until a tax deed is executed to him by the treasurer.

Cited with approval in Rice v. Bates, 68 Iowa 396, 27 N. W. 287, the court holding that the purchaser of lands at a tax sale acquires no right or interest in the land until he receives a deed therefor: That while the property is subject to redemption he has but a chattel interest.

3. Taxation and Revenue—Tax Sale of Land—Tax Deed Showing Several Parcels Sold Together for Gross Sum, Void.—Where a tax deed to lands shows on its face that several parcels were sold together for a gross sum, it is void, p. 522.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under *Hardman v. Bourne* (20 Iowa 134), Vol. II, p. 791.

FERNOW v. DUBUQUE & SOUTHWESTERN R. R. Co., 22 IOWA 528

1. Railroads—Liability for Killing Stock—Swine.—A railroad company is liable—under Chap. 169, Acts of 1862—for the killing of swine by its train on the track of a right of way granted by the owner of the swine under condition that the company fence it, and which it fails to do, and by reason of which they stray on the track and the killing occurs, pp. 529, 530.

Reaffirmed and explained in Fritz v. M. & St. P. R. R. Co., 34 Iowa 338; Lee v. Minn. & St. L. Ry. Co., 66 Iowa 132, 133, 23 N. W. 299, holding that under Sec. 6, Chap. 169, Acts of 1862, and Sec. 1289 of the Code of 1873, when a railroad has a right to fence its track, it must do so in such a manner as to turn hogs, failing which it is liable absolutely for killing or injuring them at any such place by its trains: And this is the rule although the hogs be running at large contrary to a regulation of the county, or contrary to statute.

Reaffirmed and extended in Spence v. Ch. & N. W. Ry. Co., 25 Iowa 141, 142; Stewart v. Ch. & N. W. R. R. Co., 27 Iowa 284, 285, holding further that a railroad company is liable absolutely—under Chap. 169, Acts of 1862—for killing a hog on its track at any place where it has a right to but does not fence, although the hog is at large contrary to the county regulation—the owner's merely permitting his hog to so run at large not, of itself, constituting negligence or willful act occasioning the killing—The last case holding that—under Chap. 79, Acts of 1868—the extended rule applies to the lessee of a railroad.

Reaffirmed, varied and narrowed in Smith v. Ch. R. I. & P. R. Co., 34 Iowa 98, 99, holding that, under Sec. 6, Chap. 169, Acts of 1862, a railroad company is not liable absolutely for killing or injuring stock by its train at a place where it has a right to but has not fenced, when such stock is under the control of the owner; and that in order to constitute such liability, such stock, when so killed or injured must be running at large.

Reaffirmed and qualified in Shellabarger v. Ch. R. I. & P. Ry. Co., 66 Iowa 20, 23 N. W. 159, holding that—under Sec. 1289 of the Code of 1873 [Sec. 6, Chap. 169, Acts of 1862], a railroad company is liable absolutely for killing or injuring stock running at large, by its trains at a place where it has a right to but fails to fence; but that if, at such place, the company erects a fence which is reasonably sufficient to prevent stock going upon the track, it is not so liable for so killing or injuring breachy, or vicious stock that break through or pass over such fence, and get upon its track.

Cross references. See further on this question, annotations under Russell v. Hanley (20 Iowa 219), Vol. II, p. 804. See, also, Sec. 2055 of the Code of 1897.

FINLEY v. BROWN, 22 IOWA 538

1. Appeal—Errors Not Excepted to Below—Review.—Errors not shown by the record to have been excepted to below will not be considered upon appeal to the Supreme Court, p. 540.

Reaffirmed and extended in McClintock v. Sutherland, 35 Iowa 490; Stanberry, Gibson and Stanberry v. Dickerson, 35 Iowa 494, holding further that questions not raised below will not be considered upon appeal to the Supreme Court.

Cited in Heaton v. Fryberger, 38 Iowa 207 (dissenting opinion), the majority court opinion not in point.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

2. Pleading—Demurrer—Waiver of Error in Ruling on.—Where after the overruling of his demurrer to the answer, plaintiff does not stand thereon, but goes to trial upon the issue joined by operation of law, under Sec. 2917 of the Code of 1860, he thereby waives error in the ruling on the demurrer, p. 540.

Reaffirmed and extended in Warren v. Scott, 32 Iowa 26; Gray v. Lake, 55 Iowa 156, 7 N. W. 484, holding further that where a party pleads over after an adverse ruling upon a demurrer, he waives all exceptions to the ruling on the demurrer.

Cross reference. See further on this question, annotations under Wilcox v. McCune (21 Iowa 294), Vol. II, p. 907.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

3. Pleading—Reply—When Allowable—Practice.—Under Secs. 2895, and 2917 of the Code of 1860, a reply is not allowable except upon the allegation of a counterclaim, set-off or cross demand; in all other cases the answer is to be deemed controverted by the adverse party, even though it be new matter, and in avoidance of the plaintiff's action, p. 540.

Special cross reference. For cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 2 of Davenport Sav. Fund Ass'n v. North Am. Fire Ins. Co. (16 Iowa 74), Vol. II, p. 409.

Cross reference. See further, Sec. 3576 of the Code of 1897.

4. Tax Deed to Land—Execution of Second Tax Deed by Treasurer to Correct Mistake or Informality in First.—Where a tax deed to land is informal, or contains a mistake, the county treasurer may execute a second deed to the purchaser at the tax sale, or to the holder of the certificate to correct the defectiveness or mistake in the first, p. 540.

Reaffirmed in Hurley v. Street, 29 Iowa 432, 433.

Special cross reference. For further cases citing, sustaining, quali-

fying, etc., the text, and others, see annotations under Rule 2 of Harper v. Sexton (22 Iowa 442), ante. p. 52.

CHAPMAN v. WILKINSON, ADM'R, 22 IOWA 541

1. New Trial—Discretion of Trial Court—Appeal—Reversal, When.—The trial court has a large judicial discretion in passing upon a motion for a new trial, and this ruling thereon will not be ground for reversal, except in case of manifest abuse of such discretion, or a violation of some rule of law; and a stronger case must be made out by appellant when the trial court grants than when he refuses to grant a new trial, p. 543.

Reaffirmed in Pickering v. Kirkpatrick, 32 Iowa 165.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Rule 1 of Newell v. Sanford (10 Iowa 396), Vol. I, p. 712.

Cross references. See further on this question, annotations under Shepherd v. Brenton (15 Iowa 84), Vol. II, p. 308; Braddy & Braddy v. Lumery (11 Iowa 29), Vol. I, p. 764, and cross references there found.

TWOGOOD & ELLIOTT v. PENCE, 22 IOWA 543

1. Judgment by Confession—Conclusiveness of as to Defenses at Time Rendered—Usury Defense.—In the absence of fraud, or other ground for equitable relief a judgment entered by confession is conclusive against all defenses existing at the time of its entry; and this rule applies as well to the defense of usury as to any other, pp. 544, 545.

Reaffirmed in Miller v. Clarke, 37 Iowa 327, 328.

Reaffirmed and extended in Kendig v. Marble, 58 Iowa 532, 12 N. W. 586, holding further that usury cannot be pleaded against a mortgage which secures a debt on which a judgment by confession has been rendered.

Reaffirmed and qualified in Stoddard v. Lloyd, 79 Iowa 15, 44 N. W. 208, holding the rule to apply to notes given by the defendant in satisfaction of a judgment on notes tainted with usury: But holding further, however, that the rule does not apply where a judgment is confessed merely as a means of evading the usury law: That in this latter case, the defendant can purge the amount of the usury from new notes given to satisfy such judgment.

Cited in Gilman v. Heitman, 137 Iowa 345, 113 N. W. 935, the court holding that judgments by confession, like other judgments, are not open to collateral attack, unless it be upon the ground of fraud or want of jurisdiction, or other reason which renders them wholly void and inoperative.

Distinguished and narrowed in Mullen v. Russell, 46 Iowa 388,

holding that where a judgment is confessed for the purpose of evading the usury law, the rule does not apply; and that in such case the judgment confessed is, as between the parties to the usurious contract, void to the extent of the amount in excess of the sum the plaintiff may lawfully recover.

(Note.—See further, sustaining and qualifying, but not citing, the text, *Lyon v. Welsh*, 20 Iowa 578; *Proxel v. Clark*, 9 Iowa 201.—Ed.)

Cross references. “Sufficiency of Statement for judgment by confession—Judgment on Insufficient statement, validity—Rights of Creditors—Practice and procedure in matter of judgment by confession, etc.”—See annotations under *Vanfleet v. Phillips* (11 Iowa 558), Vol. I, p. 860.

“Usury—Who may interpose plea”—See annotations under *Perry v. Kearns* (13 Iowa 174), Vol. II, p. 134.

WRIGHT *v.* MCCORMICK, 22 IOWA 545

1. Action in Equity—Jurisdiction Once Attached Retained.—When in an action in equity jurisdiction once attaches, it will be retained in order to perfect complete relief between the parties, p. 548.

Reaffirmed and extended in *Reiger v. Turley*, 131 N. W. (Unofficial) 859, holding further that under the prayer for general relief in a petition in equity, the court may retain jurisdiction and grant complete relief as involved in the issues.

2. Actions—Action on Wrong Docket.—The fact that an action is brought in equity when it should have been brought at law, or *vice versa*, is no ground for demurrer; but such irregularity must be reached by a timely motion to transfer, p. 548.

Cited in 151 Iowa 500, not yet published.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further, Sec. 3432 of the Code of 1897.

SHERMAN *v.* WESTERN STAGE CO., 22 IOWA 556

1. Limitation of Actions—Action by Husband for Death of Wife and Child Caused by Negligence of Common Carrier—When Barred—Statute Construed.—An action by a husband against a common carrier for damages for the death of his wife and child caused by the negligence of the defendant, is within the first clause of Sec. 2740 of the Code of 1860 [An action for personal injuries], and must be commenced within two years after the cause of action accrued, or the death of the parties named, or it will be barred, p. 557.

Cited in *Nord v. B. & M. Riv. R. R. Co.*, 37 Iowa 499, the court holding that an action for personal injury resulting from negligence, is barred under Sec. 2740 of the Code of 1860, unless commenced within two years after the injury is received.

Cited in Emmert v. Grill, 39 Iowa 692, 693, holding that both under the section of the text, and the Code of 1873, an action by a wife for damages by reason of the unlawful sale of intoxicating liquor to her husband, must be commenced within two years after the commission of the act by the defendant.

Cited in Kinser v. Soap Creek Coal Co., 85 Iowa 31, 32, 51 N. W. 1153, the case turning on other questions.

Distinguished in Sherman v. Western Stage Co., 24 Iowa 542, 553, 554, holding that an action by an administrator for death of his decedent caused by the negligence, or wrongful act of the defendant, is not barred until two years after the appointment of such representative.

Cross reference. See further, Sec. 3447 of the Code of 1897.

HOLTON v. BUTLER, 22 IOWA 557

1. Appeals—Errors not Excepted to Below.—Errors not excepted to below will not be considered upon appeal to the Supreme Court, p. 560.

Reaffirmed in In re Culver's Estate, 133 N. W. 724 (Unofficial).

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

KESLER v. ST. JOHN, 22 IOWA 565

1. Garnishment—Garnishee Cannot Pay Money after Service.

—A garnishee cannot after service on him, pay over money garnished, to a person other than the debtor, who claims it, and thereby defeat the rights of the garnishing creditor; and in such case the garnishee is liable to such creditor to the amount of such money, pp. 566, 567.

Reaffirmed and explained in Bowen v. Port Huron Engine & Thresher Co., 109 Iowa 258, 259, 80 N. W. 346, 77 Am. St. Rep. 539, 47 L. R. A. 131, holding that from the time of the service of notice the garnishee is liable to plaintiff for the value of all of defendant's property in his hands subject to execution, and to the amount of all debts owing by him to defendant at time of service: Holding, also, that the legal effect of the garnishment judgment is to sequester or set aside the property or money in the hands of the garnishee to the payment of plaintiff's judgment; and that in such case the garnishing creditor must collect his debt under the judgment against the garnishee if it be sufficient, and the latter be solvent at the time the judgment is rendered; that such judgment against a solvent garnishee operates as a satisfaction of the debt garnished, to the extent thereof.

TALBOT v. BLACKLEGE, 22 IOWA 572

1. Fences—Division Fences—Viewers, Proceedings of—Sufficiency of Notice to Land Owner.—Sec. 1529 of the Code of 1860,

requiring due notice to each land owner before the viewers inquire into the matter of a division fence, and assign each his share thereof, and direct the time within which they shall erect or repair it, does not mean that the notice must be in writing; and where such an owner receives verbal notice thereof, and is present at the meeting and decision of the viewers and makes no objection, it is sufficient, p. 577.

Reaffirmed and extended in Gantz v. Clark, 31 Iowa 256, holding further that if the land owners have verbal notice, or have knowledge of the meeting of the fence viewers for the purpose set out in the text, it is sufficient.

Cross reference. See further, Secs. 2356 and 2360 of the Code without any agreement, or facts by which an agreement might be implied, one land owner voluntarily builds a division fence between his land and another's, he cannot recover of such other person, the value of one-half the cost of building: That in such case the statute, Chap. 61, of the Code of 1860, in the absence of prescription or agreement, creates the obligation and prescribes the method of settling all controversies as to division fences, which is by applying to the fence viewers, and that such method must be pursued.

Cross reference. See further, Secs. 2356 and 2360 of the Code of 1860, abrogating the rule of the text, and requiring written notice.

2. Fences, Division—Erection of Fence by Owner on His Own Line—Effect.—A land owner cannot evade or defeat the law relative to proceedings of viewers, and the erection or repair of division fences, by erecting a fence on his own land, a few feet from the line, p. 578.

Distinguished and narrowed in Bland v. Hixenbaugh, 39 Iowa 536, holding that where a private right of way is necessary to afford a land owner a passage to his residence, and he makes such a way on his own land, and fences it on his side, he cannot be compelled to contribute to one-half of a division on the other side thereof.

Cross reference. See further in this connection, Secs. 2355-2370 of the Code of 1897.

3. Fences—Division—Land Owner Failing to Erect or Repair as required by Viewers—Recovery by Other Land Owner—Notice.—Sec. 1530 of the Code of 1860, relating to the recovery of double the value of his portion of a division fence by the other from the adjoining land owner who fails to comply with the order of the viewers, requiring no notice, it need not be given. The legal maxim "*expressio unius est exclusio alterius*" applies, pp. 578, 579.

Cited in Feister v. Kent, 92 Iowa 9, 60 N. W. 496, not in point; but applying the maxim on another question.

BOYNTON v. MILLER, 22 IOWA 579

1. Swamp Land Grant—Portions not Surveyed into Subdivisions do not Pass Under—Act of Congress of September 28, 1850; Construed.—Where a county grants swamp land, some of which has

never been surveyed and platted into legal subdivisions, and the county derives title through the state, which took title under the Act of Congress of September 28, 1850, granting to the state of Iowa all *legal* subdivisions, the greater part of which are wet and unfit for cultivation, such county grant does not include any land which was never surveyed and platted into legal subdivisions, pp. 582, 583.

Reaffirmed in Schlosser v. Hemphill, 118 Iowa 457, 458, 90 N. W. 843.

SOMMER v. CATE, 22 IOWA 585

1. Intoxicating Liquors—Action against Common Carrier for Loss—Allegations and Proof Required of Plaintiff.—In an action against a common carrier for loss of or failing to deliver intoxicating liquors, and for the value, or possession thereof, the plaintiff must aver and prove that at the time of the delivery to the carrier, he owned or possessed them with lawful intent, and not for the purpose of sale in violation of law, pp. 586, 587.

Reaffirmed and extended in Walker v. Shook, 49 Iowa 265, 266, 31 Am. Rep. 148, holding further that in an action by the owner of intoxicating liquors against an officer for damages by reason of the defendant failing to return them upon being ordered by the court, the plaintiff must aver and prove that at the time the defendant, officer, took possession thereof, they were not in his, plaintiff's, possession and owned by him for the purpose of unlawful sale.

Cited in Monty v. Arneson, 25 Iowa 393, 394, (Dissenting opinion), the majority court holding that the owner of intoxicating liquors in his possession for unlawful sale may recover possession thereof of a sheriff, or other person, wrongfully obtaining their possession.

LUSE v. CITY OF DES MOINES, 22 IOWA 590

1. Pleading—Facts, not Evidence to be Pleaded.—Ultimate facts on which a party relies are to be stated by him in his pleading, and not the evidence on which he relies to prove them, p. 592.

Reaffirmed in Snyder v. Ft. Madison Street Ry. Co., 105 Iowa 290, 75 N. W. 181, 41 L. R. A. 345; Green v. Eq. Mut. Life & Endowment Ass'n, 105 Iowa 635, 75 N. W. 637.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

2. Appeal—Transcript of Evidence—Certificate—Judge Cannot Sign in Vacation.—Under Chap. 49, Acts of 1866, the trial judge cannot sign the certificate to the transcript of the evidence for the purpose of an appeal, after the adjournment of the term at which the trial was had and during vacation, unless the parties agree thereto, pp. 593, 594.

Cited in Spear v. Fitchpatrick, 37 Iowa, 128, the court holding

that a judgment entered by the district court judge in vacation, without the consent of the parties, or an order therefor being entered during term-time will be reversed upon appeal.

SHEPHERD v. DISTRICT TOWNSHIP OF RICHLAND, 22 IOWA 595

1. School District—Warrant or Order of, Not Negotiable—Rights of Assignee—Defenses.—An order or warrant drawn by the officers of a school district, is not a negotiable instrument; and the assignee thereof takes subject to the same defenses as are available against it in the hands of the payee or original holder, p. 596.

Reaffirmed in Taylor v. Dist. Township of Wayne, 25 Iowa 449; Taylor v. Dist. Township of Otter Creek, 26 Iowa 282, 283; Manning v. Dist. Township of Van Buren, 28 Iowa 336; Boardman v. Hayne, 29 Iowa 342, 343.

Reaffirmed and extended in Nat'l State Bank of Mt. Pleasant v. Independent Dist. of Marshall, 39 Iowa 496, holding further that the rule is the same, although the order or warrant be payable to bearer and negotiable in form.

Cross reference. See further on this question, annotations under Clark v. City of Des Moines (19 Iowa 199), Vol. II, p. 715.

Annotations to Decisions Reported in Volume 23 Iowa

FOUNTAIN v. WEST, 23 IOWA 9, 92 AM. DEC. 405

1. Trial—Challenge of Jury—Waiver of Peremptory Challenge—Effect—Practice.—Where in the selection of a jury to try a civil action the plaintiff accepts the jury, whereupon the defendant peremptorily challenges a juror upon the panel being refilled, it is not error for the court to permit the plaintiff to peremptorily challenge a juror on the panel at the time he accepted the jury. In such case the plaintiff's waiver counts one challenge against him, p. 13.

Reaffirmed and explained in State v. Hunter, 118 Iowa 688-690, holding that—under the Code of 1897—a person accused of a crime is entitled to ten peremptory challenges, the right to be exercised at any time before the jury is sworn, unless he waives all of his challenges: Hence, holding that where, after the State has challenged eight and the accused seven, the latter waives "one more challenge," it does not waive his right to peremptorily challenge the remainder of the ten not waived.

Cross references. See further on this question, annotations under Rules 1 & 2 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), Vol. II, p. 140.

"Challenging the jury in Civil cases"—See Secs. 3677-3698 of the Code of 1897.

"Challenging the jury in Criminal Cases"—See Secs. 5358-5369 of the Code of 1897.

2. Libel and Slander—Character of Plaintiff—Defenses.—In an action of libel for damages, the defendant cannot prove, specific offenses and acts of dishonesty on the part of the plaintiff, which are not connected with the subject-matter of the action, or put in issue by the pleadings, p. 13.

Reaffirmed, explained and qualified in Marker v. Dunn, 68 Iowa 721, 722, 28 N. W. 39, holding that where, in an action for slander or libel, it appears that the defamatory words were published as of the defendant's own knowledge, evidence of rumors or reports, or that they were communicated by another to defendant, is inadmissible, either as a defense, or in mitigation of damages: That in such case particular acts or instances of misconduct of the plaintiff cannot be proved, nor rumors and reports, unless they are so general and prevalent that they have affected the general character.

Unreported citation, 132 N. W. 875.

3. Libel and Slander—Defense and Mitigation—Good Faith Belief in Truth of Publication by Defendant.—The fact that one who publishes a libel *in good faith believes* that the statements therein are true, is no defense to an action therefor; such statements must be true, in fact, to constitute justification: But such good faith belief if based upon reasonable grounds, may be pleaded and proved in mitigation of damages, pp. 14, 15.

Reaffirmed in Morse v. Times—Republican Printing Co., 124 Iowa 718, 719, 100 N. W. 871.

Cross references. See, in this connection, King v. Root, 21 Am. Dec. 102; Holmes v. Jones, 49 Am. St. Rep. 646; Moore v. Francis, 18 Am. St. Rep. 10, L. R. A. 214.

4. Libel and Slander—Crime Charged—Justification—Truth of Charge—Proof Required to Establish.—In an action for damages for a libel accusing the plaintiff of the commission of a crime, the defendant, in order to establish his plea of justification by reason of the truth of the alleged libelous publication, must introduce evidence which would be sufficient to convict the plaintiff of the crime were he on trial therefor, p. 16.

Reaffirmed in Ellis v. Lindley, 38 Iowa 462; Georgia v. Kepford, 45 Iowa 52; Barton v. Thompson, 46 Iowa 32, 26 Am. Rep. 131; Mott v. Dawson, 46 Iowa 534.

Distinguished and doubted in Welch v. Jugenheimer, 56 Iowa 19, 8 N. W. 676, 41 Am. Rep. 77, holding that the rule applies, if at all, only to actions of libel or slander imputing a crime, where truth as a justification is pleaded.

Overruled in Riley v. Norton, 65 Iowa 307, 21 N. W. 649, holding that where the defendant in an action for slander imputing a crime, pleads the truth as a justification, he need only prove his defense by a preponderance of the evidence.

5. Trial—Practice—Burden of Proof—Opening and Closing Argument—Discretion of Trial Court—Reversal on Appeal, When.—The trial court has a large judicial discretion in the matter of awarding the burden of proof, and the opening and closing argument to the jury, and his ruling thereon will not be ground for reversal upon appeal, except where a clear case of abuse thereof, and resulting prejudice, is made out, p. 14.

Reaffirmed in Preston v. Walker, 26 Iowa 208, 96 Am. Dec. 140; Ashworth v. Grubbs, 47 Iowa 354; Milwaukee Harvester Co. v. Crabtree, 101 Iowa 529, 70 N. W. 705; Shaffer v. Des Moines Coal & Hay Co., 122 Iowa 235, 236, 98 N. W. 112; Farmer v. Norton, 129 Iowa 90, 105 N. W. 372.

Reaffirmed and explained in Breiner v. Nugent, 136 Iowa 334, 111 N. W. 450, holding that the order of argument and the conduct thereof, while prescribed by statute in a general way, is nevertheless

peculiarly within the sound discretion of the trial court, and, in the absence of a showing of a clear abuse thereof, and of ground for believing that prejudice resulted, no reversal should be had on account of failure to follow the statute.

Cross references. See further on this question, annotations and notes under Rule 2 of Woodward, Adm'r v. Lavery (14 Iowa 381), Vol. II, p. 250; Rule 2 of Smith, et al. v. Coopers, et al, (9 Iowa 376), Vol. I, p. 592.

GARRETSON v. REEDER, 23 IOWA 21

1. Bonds—Statutory Bond Insufficient in Form—Validity.—A bond which is insufficient as a statutory bond is valid as a Common Law one, when it violates no law, is not against public policy, and the principal therein receives an advantage or benefit thereby.

This rule applies to a defective or informal delivery bond in an attachment action, when the attached property is released thereunder, pp. 24, 25.

Reaffirmed in Painter v. Gibson, 88 Iowa 123-125, 55 N. W. 85.

Reaffirmed and explained as to first paragraph in Carroll County v. Culbertson, et al, 136 Iowa 460, 114 N. W. 17, holding that a statutory bond may be good at Common Law though insufficient under the statute, if not in violation of law or public policy; but that this is true only when the obligors have, or at least the principal obligor has, derived some benefit or enjoyed some advantage from the giving of the bond.

Reaffirmed and extended in Wadsworth v. Walliker, 45 Iowa 398. 24 Am. Rep. 788, holding further that a Common Law Bond is to be governed by Common Law principles: That in the absence of any statutory provision to the contrary, an officer levying under an attachment (or execution) may release the property, being liable on his bond in damages to the attachment (or judgment) creditor, unless he shows that such property was not owned by the defendant (debtor), or was not subject to the writ.

Reaffirmed and extended in Moore v. McKinley, et al, Ex'rs, 60 Iowa 370, 371, 14 N. W. 770, holding further that it is not essential to the validity of an official bond of a district court clerk (for the faithful performance of his duties) that it be approved by the board of supervisors.

Reaffirmed and extended in Allen v. Platt, 79 Iowa 117, 44 N. W. 241, holding further that where an execution is levied on personal property, and a person claiming to have purchased it from the execution debtor, enters into a contract whereby, for and in consideration of the release of the property, he agrees to hold the property and its proceeds subject to the order of the court from which the execution issued, that action is maintainable thereon by the execution creditor.

Distinguished in McFarlane v. Dick, 145 Iowa 93, 94, 123 N. W.

1006, holding that where, after a levy upon personal property under an attachment, a third person who claims the property serves a notice of ownership on the officer, which notice is insufficient under Secs. 3906, 3991 of the Code of 1897, because failing to show the source of title or the consideration paid by the third person for the property, the fact that such officer thereafter takes a paper from the attachment creditor supposing it to be an indemnifying bond, but which is void and of no effect, does not dispense with the requirement that the third person give a sufficient notice to the officer, before the latter and the sureties on his bond are liable to the third person for selling such property: That unless such notice is given, or is waived, the officer and his sureties are not so liable.

Distinguished and narrowed in State v. Heisey, 56 Iowa 405, 406, 9 N. W. 327, holding that where an officer is not required by statute to execute a bond for the faithful performance of his duties, such a bond is without consideration and is void.

Cross reference. See further on this question, annotations and note under Sheppard & Morgan v. Collins (12 Iowa 570), Vol. II, p. 98.

2. Attachment Lien—Judgment in Attachment Action.—In order to continue an attachment lien it is not necessary for the judgment to order the attached property to be sold, pp. 24, 25.

Special cross reference. For cases citing the text, and others, see annotations under Waynant v. Dodson (12 Iowa 22), Vol. II, p. 3.

APPANOOSE COUNTY v. WALKER, 23 IOWA 26

1. Appeal—Rulings not Excepted to Below not Reviewed.—Errors in the rulings of the trial court which were not excepted to below, will not be considered or reviewed upon appeal to the Supreme Court, p. 26.

Reaffirmed in Barkdull v. Callanan, 33 Iowa 394.

Unreported citation, 133 N. W. 724.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

STATE v. VAN VLEET, 23 IOWA 27

1. Criminal Law—Minutes of Evidence before Grand Jury—Brevity of Does Not Render Evidence upon Trial Incompetent.—Upon the trial of an indictment, the brevity of the minutes of the evidence before the grand jury does not render the witnesses whose names are indorsed upon the indictment incompetent to testify to any facts set out in the minutes, p. 28.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Rule 2 of State v. Bowers (17 Iowa 46), Vol. II, p. 490.

PHIPPS v. PENN, 23 IOWA 30

1. Demurrer—Ruling on Not Excepted to—Review on Appeal.

—A ruling on a demurrer will not be reviewed upon appeal to the Supreme Court when exception was not taken thereto below, p. 31.

Reaffirmed and extended in Appanoose County v. Walker, 23 Iowa, 26; Barkdull v. Callanan, 33 Iowa 394, holding further that rulings of the trial court which are not excepted to below will not be reviewed, or errors therein be cause for reversal upon appeal to the Supreme Court.

Reaffirmed and varied in Roberts v. Cass, 27 Iowa 226, holding that where no exceptions are taken below to a report of a referee or to the judgment rendered thereon, the cause will not—under Sec. 3095 of the Code of 1860—be reviewed upon appeal to the Supreme Court.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

Cross reference. See Rule 2 hereof, in this connection.

2. Appeal in Chancery Action—Review on—Necessity for Exception to Final Decree.—Under the Code of 1851, no exception was necessary to be taken to the final decree in a chancery action in order to have it reviewed upon appeal to the Supreme Court; but whether the Code of 1860 has changed this rule is doubtful, and is not decided, p. 31.

Cited in Dicken v. Morgan, 59 Iowa 158, 159, 13 N. W. 57, holding that under the Code of 1873, no exception is required to the final decree in an equitable action in order to authorize a trial *de novo* upon appeal to the Supreme Court.

Cited in Wolf v. Smith, 36 Iowa 455, the court not deciding the point.

CAIN v. CAIN, 23 IOWA 31

1. Will—Bequest or Devise to Widow—When it is in Lieu of Dower.—Aside from statute a bequest or devise to the testator's widow will not be held to be in lieu of dower, unless the will expressly so states, or it appears thereby that if she took both dower and under the will, some part of the testator's disposition would be defeated, or that the taking of dower by her is repugnant to the provisions of the will, pp. 38, 39.

Reaffirmed in Van Guilder v. Justice, 56 Iowa 670, 671, 10 N. W. 239; Snyder v. Miller, Ex'r, 67 Iowa 264, 265, 25 N. W. 242; Daugherty v. Daugherty, 69 Iowa 679, 29 N. W. 779; Hunter v. Hunter, 95 Iowa 731-734, 64 N. W. 657, 58 Am. St. Rep. 455; Parker v. Parker, 129 Iowa 602, 603, 106 N. W. 9.

Reaffirmed and explained in Potter v. Worley, 57 Iowa 68, 10 N. W. 298, holding that when a widow's claim to dower is not inconsistent with her husband's will, she is not required to object to or relinquish her rights under the will before she can have dower; and that in such case, dower vests in the widow at her husband's death, without action on her part, and regardless of the provisions of his will.

And see 148 Iowa 295, not yet published.

Unreported citation, 126 N. W. 1130.

(Note.—See further, Richards v. Richards, 90 Iowa 606, 58 N. W. 926; Parker v. Hayden, 84 Iowa 495, 51 N. W. 248; Severson v. Severson, 68 Iowa 656, 27 N. W. 811; Kyne v. Kyne, 48 Iowa 21; McGuire v. Brown, 41 Iowa 650; Watrous v. Winn, 37 Iowa 72; Metteer v. Wiley, 34 Iowa 214; Sully v. Nebergall, 30 Iowa 339; Shields v. Keyes, 24 Iowa 298; Clark v. Griffith, 4 Iowa 405; Corriell v. Ham, 2 Iowa 552, some important cases on this subject, not citing the text—Ed.)

Cross references. See further on this question, annotations under Rule 1 of Clark, Adm'r, v. Griffith, Ex'r, (4 Iowa 405); Rules 1 & 2 of Corriell v. Ham (2 Iowa 552), Vol. I, pp. 323 and 242, respectively.

LATHROP v. BROWN, 23 IOWA 40

1. Judgment Lien on Real Estate—Sale under Junior Judgment—Effect on Senior.—A judgment lien on real estate and the rights of purchasers thereunder, are not affected by a sale of the property under a junior judgment, pp. 45, 51.

Reaffirmed and explained in Matless v. Sundin, 94 Iowa 114, 62 N. W. 653, holding that a sale of real estate under a junior judgment passes title subject to all prior liens; and if the same plaintiff has two judgment liens on the same land, he may sell under the junior without releasing or in any way affecting the senior, unless it can be shown that he was guilty of some fraud upon the purchaser, as by misleading him in relation to the existence of the senior judgment.

Reaffirmed and extended in Churchill v. Morse, 23 Iowa 233, 92 Am. Dec. 422, holding further that one who purchases the equity of redemption of a judgment debtor in land at an execution sale thereof, takes subject to the rights of a good faith purchaser thereof from the judgment debtor before the rendition of the judgment.

2. Judgment Liens on Real Estate—When Lien Attaches by Issuing and Levying Execution.—Where judgments are held by different persons and none of them are liens upon the real estate of the judgment debtor, the first one issuing an execution and levying thereon, has the superior lien, p. 48.

Cited in Kisterson v. Tate, 94 Iowa 667, 63 N. W. 351, 58 Am. St. Rep. 419, the court holding that where two creditors obtain judg-

ments on their demands on different dates, and thereafter the judgment debtor acquires land subject to execution, both judgments become liens on the land so acquired, at the same time and neither has priority.

3. Judgment Lien on Real Estate—To What Interest it Attaches.—A judgment is a lien under our statute upon all interests, legal or equitable, of the judgment debtor in real estate; and, as between the parties, this is the rule whether the evidence of the judgment debtor's interest, or instrument conveying it, be or be not recorded.

So where a partnership purchases real estate and attempts to have the title conveyed to one member of the firm, and the deed by mistake fails to convey the legal title, which remains in the vendor, the lien of a judgment against the firm attaches thereto, and it may be sold thereunder, p. 49.

Reaffirmed as to first paragraph in Kalona Sav. Bank v. Eash, 133 Iowa, 192, 193, 109 N. W. 888.

Cited in Taylor v. Branscombe, 74 Iowa 536, 38 N. W. 401, holding that a creditor has a right to proceed in equity to set aside a deed to lands made by his debtor, as fraudulent, and to attach such property therein: That in such case the grantee in the fraudulent deed is regarded as holding the land conveyed in trust for the grantor, to be applied to the latter's debts, and that as to the creditor, the grantor (debtor) is regarded as the *cestui que* trust having an interest in the fraudulently conveyed property which may be subjected in a civil action.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Evans v. McGlasson (18 Iowa 150), Vol. II, p. 601.

4. Partnership—Judgment against Firm—Sale of Firm Realty as Belonging to Member of, under Execution on.—A sale of real estate as belonging to a member of a partnership, under an execution against the firm and issued on a judgment against it, does not pass the title or interest of the firm therein, pp. 49, 50.

Cited in Anderson v. Wilson, 142 Iowa 162, 120 N. W. 678, the court holding that under Sec. 3468 of the Code of 1897, the creditor of a partnership may sue a partnership as such, or any member or members thereof which he chooses to make a party, and may enforce his judgment against such defendant or defendants, without losing his right to bring a new action against other members not made parties; but that the execution cannot be broader than the judgment, and a judgment against a partnership does not authorize an execution against the individual property of the members of the firm.

RUTLEDGE *v.* SQUIRES, 23 IOWA 53**1. Partnership—Extent of Member's Power to Bind Firm.—**

A partnership is not liable for the separate and individual transaction or debt of one of its members, when the party seeking to enforce the liability knew all the facts at the time he dealt with the member, p. 58.

Reaffirmed and extended in Brewster *v.* Reel, 74 Iowa 508, 38 N. W. 382, holding further that a partner cannot pledge the firm credit, nor use the firm property, to secure or pay his individual debts; nor can one partner bind the firm by a transfer of its property to secure the debt of a co-partner without the latter's consent.

Cross reference. See further on this question, note under Rule 3 of Sternburg *v.* Callanan & Ingham (14 Iowa 251), Vol. II, p. 234.

BLACKWELL *v.* DENIE, 23 IOWA 63

1. Bills and Notes—Negotiable Note—Stamp Affixed after Execution and Delivery—Rights of Innocent Holder.—The fact that a stamp was not affixed to a negotiable instrument at the time of its execution and delivery, is not available as a defense against a holder for value, who took it before maturity and without notice, a stamp being affixed thereto at the time he so took, p. 56.

Reaffirmed in Gage *v.* Sharp, 24 Iowa 18; Anderson & Co. *v.* Starkweather, 28 Iowa 410; Robinson *v.* Lair, 31 Iowa 11; Sperry *v.* Horr, 32 Iowa 187; Lake *v.* Streeter, 34 Iowa 601 (abstract).

Distinguished in First Nat'l Bank *v.* Dougherty, 29 Iowa 261, holding that such defense is available against a holder who took with knowledge.

BALDWIN *v.* TUTTLE, 23 IOWA 66

1. Appeal in Equity Actions—Trial De Novo—Sufficiency of Record—Certificate of Clerk.—Upon an appeal to the Supreme Court in an equitable action tried according to the first method provided by Sec. 2999 of the Code of 1860 (all the evidence in writing), a trial *de novo* will be had when the record contains the depositions and papers in their original form which were used in evidence below, as required by Sec. 3512 of the Code of 1860, which record and evidence is properly certified by the clerk of the district court, p. 71.

Reaffirmed and explained in Cross *v.* B. & S. W. R. R. Co., 58 Iowa 65, 66, 12 N. W. 72, holding that upon an appeal to the Supreme Court in an equitable action tried according to the first method, either the district court clerk or the trial judge may certify the record as containing the depositions and papers used in evidence in their original form as required by Sec. 3184 of the Code of 1873, corresponding to Sec. 3512 of the Code of 1860; and that this section is not repealed by Sec. 2742 of Miller's Code (Chap. 145, Acts of Seventeenth Gen-

eral Assembly), and this last section does not apply to or control such a certificate when signed by the clerk—but see *Teague v. Fortsch*, 98 Iowa 99, 100, 66 N. W. 1059, (citing and qualifying the text), holding that under Chap. 35, Acts of Nineteenth General Assembly, the trial judge must certify all the evidence introduced upon the trial, and the clerk must thereafter certify to and identify the record.

Cross reference. See further, Secs. 3652-3654, 4122-4126 of the Code of 1897.

2. Decedent's Estate—Filing Claims Against—Limitation as to—Judgment Lien Existing Before Death of Decedent.—Sec. 2405 of the Code of 1860, requiring claims against the estate of a decedent to be filed in the county court within a year and a half after the appointment of an administrator and notice thereof, does not apply to a judgment against a decedent rendered before his death; and failure to comply with such a section does not bar an action to enforce a lien given by the judgment, pp. 71, 72.

Reaffirmed in *Davis v. Shawhan*, 34 Iowa 94.

Reaffirmed and extended in *Goodnow v. Wells*, 67 Iowa 657, 25 N. W. 865, holding further that an action to enforce a lien for taxes on a decedent's land accruing before his death, may be brought afterward, without filing a claim therefor against the estate.

Reaffirmed and extended in *Boyd v. Collins*, 70 Iowa 298, 30 N. W. 575, holding further that—under Sec. 3092 of the Code of 1873—a judgment lien on land may be enforced after the death of the judgment debtor, without the judgment creditor filing his claim against the estate.

Reaffirmed and qualified in *Hansen's Empire Fur Factory v. Teabout*, 104 Iowa 367, 73 N. W. 877, holding that while a judgment against one who has since died may be enforced against the real estate upon which it is a lien, without filing it as a claim against the estate, yet this must be done while the judgment lien exists.

Cross reference. See further on this question, annotations under *Allen v. Moer, Adm'r*, (16 Iowa 307), Vol. II, p. 439.

3. Fraudulent Conveyances—Limitation of Actions—Burden of Proof.—When in an action to set aside a conveyance to land as fraudulent, the defendant interposes the plea of the statute of limitation, the burden is on him—under Sec. 2741 of the Code of 1860—to prove that the action was not commenced by the plaintiff within five years after the discovery of the fraud by plaintiff, p. 72.

Reaffirmed in *Harlin v. Stevenson*, 30 Iowa 375, 376.

Cross reference. See further on this question, Secs. 3447 and 3448 of the Code of 1897.

4. Fraudulent Conveyances—Conveyance Partly Voluntary and Fraudulent on Face but in Part for Value and Valid—Burden of Proof.—Where a conveyance of two separate tracts of land pur-

ports on its face to be in part voluntary and therefore fraudulent and void as to existing creditors of the grantor, then, in an action by such a creditor to set it aside for such cause, the burden is on the defendant (grantee) to prove what portion of the land included in the instrument was conveyed for a valuable consideration, p. 74.

Reaffirmed and explained in Long, Adm'r, v. Garey Investment Co., 135 Iowa 403, 112 N. W. 552, holding that where a partial consideration is paid, if the difference between the price paid and the actual value of the property is apparent, the conveyance will be regarded as voluntary to the extent of that difference; and that the burden of proof is upon the grantee to establish facts which will repel the presumption of fraud, and to show the deed to have been for a valuable consideration.

DEMING v. HANEY, 23 IOWA 77

I. Limitation of Actions—Contract to Convey Land—Action by Purchaser for Breach—When Barred.—When a vendor contracts to convey land upon the payment by the purchaser of the purchase price when it becomes due, and the purchaser at this last time tenders the balance due to the vendor, and demands a deed, which is refused the purchaser may sue for breach of contract at any time within ten years from such tender and refusal, and recover the amount of the purchase price paid, with interest at the rate of six per cent. per annum from the date of the tender and refusal, pp. 79, 80.

Reaffirmed in Owen v. Riggins, 113 Iowa 740, 84 N. W. 714.

SIMPSON v. COCHRAN & CHERRIE, 23 IOWA 81, 92 AM. DEC. 410

I. Judgment—Action on Allowed.—A judgment whether domestic or foreign gives the party in whose favor it is rendered, a complete right to sue thereon; and the fact that execution may issue thereon does not affect this right, pp. 82, 83.

Reaffirmed in Perry & Townsend v. Saunders, 36 Iowa 429.

Reaffirmed and qualified in Weiser, Adm'x, v. McDowell, 93 Iowa 774, 777 (cited in dissenting opinion, 780, 782), 61 N. W. 1094, holding that an action on a judgment where there is no loss or destruction of the record, or leave of a court granted to sue within fifteen years, may, under Secs. 2521 and 2529 of the Code of 1873, be brought within twenty years after the expiration of fifteen years next following the date of its rendition.

ANSON v. WINNESHEIK INS. CO., 23 IOWA 84

I. Fire Insurance—Policy of on Property Taken out by Heirs in Name of Ancestor—Estoppel of Company.—Where a local agent of a fire insurance company *with full power to take risks*, at the time of taking an application for a fire insurance policy knows that an

ancestor to whom the property formerly belonged is dead, and tells the heirs applying for the insurance that it will have to be taken in the ancestor's name, such facts estop the insurer from claiming that it is not liable for loss under the policy, to the heirs of the ancestor, although the policy was issued in the name of the dead person, pp. 86, 87.

Cited in Miller v. Mut. Ben. Life Ins. Co., 31 Iowa 225, 7 Am. Rep. 122, holding that notice to an agent relating to business which he is authorized to transact and while actually engaged in transacting it, will, in general, operate as notice to the principal; and that this rule applies to notice to an agent of an insurance company.

Distinguished in Fuller & Johnson v. Phoenix Ins. Co., 61 Iowa 353, 354, 15 N. W. 274, holding that a party cannot under guise of a waiver of conditions, make the policy cover property not described therein, and not owned by the insured.

2. Insurance Companies—Misrepresentations or Misstatements in Application for Policy by Agent—Estoppel by.—Where a local agent has authority only to receive and forward applications for insurance to an insurance company, parol evidence is inadmissible to prove that the agent incorrectly took down, or changed the statements in such an application: But if a local agent of such a company has the power to and does pass upon a risk without submitting it to the insurer, and fails to correctly take down facts stated by the applicant, in ignorance of which the application is signed, then, in the absence of an express provision in the policy to the contrary, the insurer is thereby estopped from claiming any rights by reason thereof, pp. 87, 88.

Reaffirmed in Mershon v. Nat'l Ins. Co., 34 Iowa 89, 90.

Special Cross reference. For further cases citing and sustaining the text, and others on the question, see annotations under Rules 3 & 4 of Ayers v. Hartford Ins. Co. (17 Iowa 176), Vol. II, p. 513.

STATE v. BATES, 23 IOWA 96

1. Criminal Law—Aiding Escape of Prisoner—Indictment for—Evidence—Defense.—Upon the trial of an indictment for aiding and assisting a prisoner to escape as denounced by Sec. 4293 of the Code of 1860, evidence of the guilt or innocence of the prisoner aided is inadmissible: The innocence of the prisoner aided is no defense to such an indictment, p. 98.

Reaffirmed in State v. Johnson, 136 Iowa 231, 113 N. W. 833, upon the trial of an indictment under Sec. 4894 of the Code of 1897, for aiding prisoner charged with a felony, to escape.

Reaffirmed and extended in Montgomery v. Sutton, 58 Iowa 698, 701, 12 N. W. 719; and 67 Iowa 698, 699, 25 N. W. 748, holding further that the rule applies to an action for malicious prosecution by reason of arrest and prosecution for resisting an officer in making an

arrest; and that the question of the guilt or innocence of the person being arrested at the time the resistance was made, is immaterial and inadmissible in such action.

ZAPPLE v. RUSH, 23 IOWA 99

1. Pleading—General Demurrer to Whole of Division of Answer Some Parts of Which are Good—Effect—Practice.—A general demurrer to the whole of a division to an answer, when some parts thereof are good, must be overruled, p. 101.

Reaffirmed and explained in Holbert v. St. L., K. C. & N. Ry. Co., 38 Iowa 315, 316, holding that when an entire pleading is attacked by demurrer, it should be overruled, if any part of the pleading states a cause of action or defense.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

Special cross reference. For further cases citing and sustaining the text, and others on the question, see annotations and note under Jarvis v. Worwick (10 Iowa 29), Vol. I, p. 637.

Cross reference. See further on this question, annotations under Darr v. Lilley (11 Iowa 4), Vol. I, p. 759.

OSBORN v. CLOUD, 23 IOWA 104, 92 AM. DEC. 413

1. Attachment Action—Service of Original Notice by Publication in, and Levy on Property After Return Day of Writ—Judgment in, Void.—Where in an attachment action the service of the original notice is by publication only, and the property is levied upon after the return day of the writ, a judgment subjecting it to sale is void, p. 107.

Special cross reference. For cases citing the text, and others see annotations under Weil v. Lowenthal (10 Iowa 575), Vol. I, p. 751.

2. Abatement—Pendency of Another Action—When Not Cause for.—The fact that another action is pending in which plaintiff and defendant are parties, and in which plaintiff might obtain relief by cross petition, is no bar to or cause for abatement of the action brought by the plaintiff, p. 108.

Reaffirmed and explained in Watson v. Richardson, 110 Iowa 702, 80 N. W. 417, 80 Am. St. Rep. 331, holding that in order for an action to be abated by reason of the pendency of another action, they must involve the same cause of action; it being insufficient if they are both dependent upon the same right or title.

3. Judgment—Attachment of Not Allowed—Garnishment is Proper.—A creditor of a judgment creditor cannot, under the Code of 1860, levy upon and sell the judgment under an attachment, but must proceed by garnishment of the judgment debtor, pp. 108, 109.

Reaffirmed and explained in Ochiltree v. M. I. & N. Ry. Co., 49 Iowa 152, 153, holding that a judgment may be levied upon and sold under execution as any other personal property, under Sec. 3046 of the Code of 1873; but it can only be attached by garnishment under Sec. 2967 of that Code.

Reaffirmed and varied in Cedar Rapids Pump Co. v. Miller & Sons, 105 Iowa 676, 677, 67 Am. St. Rep. 322, 75 N. W. 504, holding that the levy upon books of account, either under attachment or execution, does not reach or subject the debts therein; they must be reached by garnishment.

NOBLE v. STEAMBOAT NORTHERN ILLINOIS, 23 IOWA 109

1. Principal and Agent—Fraud or Misrepresentations of Agent—Receipt Obtained by Fraud of Agent Not Binding.—Where an agent by fraud or misrepresentations, obtains a receipt in full for a debt due by his principal upon the payment of an amount less than the debt, the creditor may sue the principal for the balance of the debt due, and which is in fact unpaid; and this is true although the principal has settled with the agent, and paid the full amount of the debt to him, p. 111.

Cited in John Gund Brewing Co. v. Peterson, 130 Iowa 304, 106 N. W. 742, holding that misrepresentations made by an agent in connection with a sale which he is authorized to make, are binding upon the principal, although the former had no express authority to make them.

2. Fraud—Pleading—When Reply Not Necessary—Fraud May be Proved in Avoidance of Defense Without Amendment.—When a reply to an answer is not allowed under Sec. 2895 of the Code of 1860, the plaintiff may prove fraud in avoidance of a defense set out in the answer, under the denial and issue made by operation of law, p. 111.

Reaffirmed and explained in Bargar v. Farris & Wilmer, 34 Iowa 230, 231, holding that unless an answer contains a set-off, counterclaim, cross petition or cross demand, no reply thereto is necessary; that all other affirmative allegations in an answer are denied by operation of law: And that when a reply is filed when not required, it does not change the issue or shift the burden of proof, and the case stands as if it had not been filed.

Reaffirmed and explained in Corbin v. Beebee, 36 Iowa 340, holding that an answer setting up new matter in confession and avoidance of plaintiff's cause of action, but not constituting a counterclaim, set-off or cross demand, is to be taken as denied, without a reply being filed: And in such case the plaintiff may prove facts tending to avoid the effect of the defense set out in the answer, although they are not specially pleaded by him.

Cited in *McCready v. Sexton & Son*, 29 Iowa 403, 4 Am. Rep. 214 (dissenting opinion), the majority court opinion turning upon other questions.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, Sec. 3576 of the Code of 1897.

BROWN v. CRANDALL, 23 IOWA 112

1. Appeal from Justice's Court—Revenue Stamp—When Deputy Collector May Affix.—Under the United States Revenue law requiring a stamp to be affixed to the appeal bond or other paper, upon an appeal from a justice's to the district court, and allowing the collector of revenue or his deputy to affix it later in certain cases, unless the act of the deputy in affixing it and remitting the penalty is authenticated with the official seal of the collector, or it is shown by sufficient evidence *aliunde* that the collector was sick or otherwise unable to act at the time, and that the deputy was authorized for the time-being to exercise the power, the act of the deputy will be treated as a nullity, p. 114.

Reaffirmed and extended in *McAfferty v. Hale*, 24 Iowa 358, 359, holding further that when a stamp is affixed to a written instrument by the deputy without authority, the instrument is not admissible in evidence.

Special cross reference. For further cases citing the text, and others *overruling* it, see annotations under *Hugus v. Strickler* (19 Iowa 413), Vol. II, p. 743.

SWEARINGEN v. STANLEY, 23 IOWA 115

1. Libel and Slander—Pleading—Petition—Allegations of, as to Defamatory Sense of Language Used.—Under Sec. 2928 of the Code of 1860, a petition in an action for slander need only state generally that the words were spoken of and concerning plaintiff, were false, and were used in a defamatory sense, specifying it, p. 121.

Special cross reference. For cases citing, sustaining, etc., the text, and others on the question, see annotations under *Kinyon v. Palmer* (18 Iowa 377), Vol. II, p. 651.

Cross reference. See further on this question, Sec. 3592 of the Code of 1897.

MCBRIDE v. DOTY, 23 IOWA 122

1. Mortgage Insufficiently Stamped—Effect of Recording and Subsequently Affixing Stamp by Collector as Against Good Faith Purchasers, Etc.—Constructive Notice.—Where, under the United States Revenue law, a mortgage is executed and delivered, insufficiently

stamped, and is thereupon recorded, the fact that the collector of revenue thereafter allows a sufficient stamp to be affixed thereto, does not interfere with the superior rights of a good faith purchaser, or mortgagee of the mortgaged property, who took without actual notice; as such recording of the insufficiently stamped mortgage did not impart constructive notice, and the subsequent stamping did not cure the defect, as to such other purchaser, or mortgagee, p. 123.

Distinguished in Wilson v. Reuter, 29 Iowa 180, holding that the rule is inapplicable to a purchaser or mortgagee of the mortgaged property, who takes *with notice* after the stamp is properly affixed to the first instrument.

Special cross reference. For further cases citing the text, and others *impliedly overruling it*, see annotations under Hugus v. Strickler (19 Iowa 413), Vol. II, p. 743.

PARKER v. SLAUGHTER, 23 IOWA 125

1. Appeal—Rulings Not Excepted to Below.—Errors in the rulings of the trial court to which no exceptions were there taken, will not be considered upon appeal to the Supreme Court, pp. 127, 128.

Reaffirmed in Barkdull v. Callanan, 33 Iowa 395.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

HUBBARD v. BOARD OF SUPERVISORS OF JOHNSON COUNTY, 23 IOWA 130

1. Taxation and Revenue—Shares of National Banks.—Under the National Banking Act the shares of national banks may be taxed by state law in the hands of the stockholder, but the capital of such a bank cannot be so taxed to it. As the state law in reference to taxation of state banks authorizes their capital to be assessed and taxed to them, and does not authorize their shares to be taxed to the stockholder, and as Chap. 108, Acts of 1866, relative to taxation of national bank stock, is dependent upon the other state law as to the manner of taxation, such Act of 1866 is unconstitutional, pp. 144-146, 149-152.

Reaffirmed in Olmstead v. Board of Supervisors of Henry County, 24 Iowa 34; *Lauman v. County of Des Moines*, 29 Iowa 311.

Reaffirmed and explained in National State Bank of Oskaloosa v. Young, 25 Iowa 312, 313, holding that all property of national banks except real estate, is exempt from state, county, and municipal taxes, the taxation of the shares in the hands of the stockholder being in lieu thereof.

Cited in Henkle v. Town of Keota, 68 Iowa 340, 27 N. W. 253, the court holding that shares of stock in state banks must—under Sec. 821 of the Code of 1873, and Chap. 63, Acts of Fifteenth General Assembly—be taxed in the hands and name of the owner.

Cited in Equitable Life Ins. Co. v. Board of Equalization of Des Moines, 74 Iowa 183, 37 N. W. 143, the court holding that shares in a private corporation are to be assessed to their owners, as of their cash value, and that the corporation is to be assessed on its money, or property, after deducting the distributable share thereof due the stockholders in case the business were to be wound up at the time of the assessment of the corporation—As such distributable shares augment the value of the stock on which the owner pays taxes.

Cited in German American Sav. Bank v. City Council of Burlington, 118 Iowa 86, 91 N. W. 830, holding that when the shares of stock of a banking association organized under the laws of this state are assessed to it as required by law, instead of to the individual stockholders, it cannot deduct from the amount thereof, the amount of United States bonds held by it.

Cited in Bulkley v. Callanan, 32 Iowa 465, erroneously, the case turning on other questions.

Distinguished in Morseman v. Younkin, 27 Iowa 352, upholding constitutionality of the Act of 1868 (Acts of 1868, p. 213), requiring shares of national banks to be taxed as personal property in the hands and name of their owner, to be assessed as other moneyed capital in the hands of individuals.

Distinguished in Primghar State Bank v. Rerick, treasurer, 96 Iowa 243, 64 N. W. 803, the court upholding constitutionality of Sec. 1, Chap. 39, Acts of Twenty-third General Assembly, providing that "all shares of the capital stock of banking associations organized under the general incorporation laws of the state, known as state or commercial banks, shall be assessed to such banks in the city or town where located, and not to individual shareholders."

And see 150 Iowa 98, 99, 129 N. W. 476.

Unreported citation, 133 N. W. 769, 770.

STATE v. BENHAM, 23 IOWA 154, 92 AM. DEC. 417

1. Homicide—Self Defense—Evidence—Physical Proportions, and Threatening to Use Deadly Weapon.—Upon the trial of an indictment for homicide, the physical strength and proportions of deceased as compared with those of the accused, and the fact that deceased was blandishing and threatening to use an ox gad to injure accused, and the size thereof, are competent facts, to be weighed by the jury on the question of self defense, p. 161.

Cited in State v. Sullivan, 51 Iowa 143, 144, holding that when a man assaults another with or uses upon another, a deadly weapon in such a manner that the natural, ordinary and probable result of the use of such deadly weapon in such manner would be to take life, the law presumes that such person so assaulting, intended to take life.

2. Homicide—Self Defense.—Self defense applies where one kills his adversary when it seems reasonably necessary to him in order to save his own life, or himself from imminent and enormous bodily injury, felonious in its character, pp. 162, 163.

Reaffirmed and explained in State v. Mahan, 68 Iowa 306, 20 N. W. 450, holding—as does the present case—that the killing of an assailant is justified on the ground of self defense, only when it is, or reasonably appears to be, the only means of saving the life of the one assaulted, or of preventing some great injury to his person: That if the danger which seems to threaten the person assaulted can be avoided or prevented by any other reasonable means within his power, he is not justified in taking the life of his assailant.

Reaffirmed and explained in State v. Murdy, 81 Iowa 613, 47 N. W. 871, holding that the expressions “enormous injury,” “enormous bodily injury” and “dreadful injury” in instructions relative to self defense are synonymous with “great bodily harm,” and do not constitute reversible error.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others, see annotations under Rule 2 of State v. Thompson (9 Iowa 188), Vol. I, p. 561.

Cross references. See further on this question, annotations under State v. Kennedy (20 Iowa 569); State v. Neely (20 Iowa 108); State v. Decklots (19 Iowa 447), Vol. II, pp. 862, 786, and 748, respectively.

3. Criminal Law—Duty of Court to Charge the Jury.—Upon the trial of an indictment it is the duty of the court to clearly charge the jury, or see that they are so instructed upon the whole law of the case, pp. 161, 162.

Special cross reference. For cases citing the text, and others, see Rule 2 of Owen v. Owen (22 Iowa 270), ante. p. 30.

*BOLINGER v. HENDERSON, 23 IOWA 165

1. Tax Sale—General Offer to Redeem by Land Owner—What Not Sufficient to Preserve Right—Innocent Purchaser.—A general offer to the clerk to pay all taxes in arrears, or to redeem real estate sold for taxes, without offering any specific amount, or without redeeming or requesting to redeem from a specific tax sale, will not entitle a land owner to maintain an action in equity to redeem, after the expiration of the statutory period therefor, such land from an innocent purchaser of the property sold for taxes, p. 167.

Cited in Moore v. Hamlin, 38 Iowa 438, holding that where, after his purchase of land previously sold for taxes, a purchaser inquires of

*Note.—77 N. W. 861, unofficial, cites this case, but is not in point on anything in it.—Ed.

the county treasurer whether there are any "back taxes" thereon, but not whether it had "previously been sold for taxes," and is answered in the negative, but it does not appear that the purchaser, at the time of making the inquiry, was prepared or ready to redeem, such facts do not authorize a redemption by such purchaser from such a prior tax sale, after the statutory period of redemption.

Partially overruled in Corning Town Co. v. Davis, 44 Iowa 625, 626, (cited in dissenting opinion, 636), holding that where a land owner or other person entitled to redeem, before the expiration of the statutory period for redemption, leaves money with the clerk of the district court sufficient to pay all taxes on the land, and to redeem from all tax sales therefor, with directions to the clerk to examine the records, pay all taxes thereon, and redeem from all tax sales thereof, the fact that the clerk fails to make redemption from such a tax sale, will not preclude such owner or other person entitled to redeem, from maintaining an action in equity therefor, after the expiration of the statutory period.

(Note.—See further, narrowing, but not citing the text, Noble v. Bullis, 23 Iowa 559.—Ed.)

2. Practice—Pleading—Redundant or Irrelevant Matter in—Motion to Strike—Demurrer.—Where a pleading is good in part, but contains irrelevant or redundant matter, the latter may be stricken upon motion therefor, but cannot be reached by demurrer; but if the entire matter of a pleading is subject to this objection, a demurrer will lie, p. 168.

Reaffirmed in In Re Estate of McMurray, 107 Iowa 650, 78 N. W. 691; Seaton v. Grimm, 110 Iowa 147, 148, 81 N. W. 225.

Reaffirmed and explained in Johns v. Pattee, 55 Iowa 667, 8 N. W. 664, holding, also, that immaterial matter in a pleading is anything stated therein which, if established upon the trial, would not entitle a party to, or aid him in obtaining the relief demanded, or in sustaining the defense pleaded.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, Sec. 3618 of the Code of 1897.

STATE v. VAN VLEET, 23 IOWA 168

1. Criminal Law—Fine—How Satisfied—Practice.—Where a person is imprisoned for a fine and costs against him, and after serving the requisite number of days of imprisonment entitling him to liberation [one day for every \$3.33 1-3 of the fine, under Sec. 4881 of the Code of 1860] thereupon delivers to the sheriff a schedule of his property under oath, and a note for the amount of the fine and costs executed by him, and payable to the county treasurer, as required by Sec. 5005 of the

Code of 1860, such facts constitute a satisfaction of the judgment for the fine and costs, no execution can thereafter issue thereon, and such person is entitled, upon his motion, to have the judgment satisfied of record, pp. 169, 170.

Reaffirmed and extended in State v. Peck, 37 Iowa 343, 344; State v. Jordan, 39 Iowa 390, holding that, under Sec. 5005 of the text, a person against whom a fine is entered is entitled to the relief set out in the text, after he has been imprisoned for thirty days thereunder, upon compliance with such section as set out in the text.

Cross reference. See further on this question, Sec. 5533 of the Code of 1897.

HUNT v. BRATT, 23 IOWA 171

1. Venue—Action for Failure to Pay for Goods Ordered.—An action for failure to pay for goods shipped and delivered to the defendant in a particular county upon his written order, must—under the Code of 1860—be brought in the county of the defendant's residence, unless the order expressly provides that the defendant is to pay therefor in another county, in which last case it must—under Sec. 2798 of the Code of 1860—be brought in the latter, p. 172.

Reaffirmed in Manley v. Wolfe & Co. 24 Iowa 142-144.

Reaffirmed and explained in Oliver v. Bass, 30 Iowa 91, holding that an action for breach of a written contract by failing to deliver personal property purchased, at a particular place and county as expressly provided by the contract, may be brought in the county where it was to have been delivered.

Reaffirmed and explained in Independent School District of Mason City v. Reichard, 39 Iowa 170, holding that an action on a bond, the covenants of which were not to be performed in any specified place, must be brought in a county wherein some of those who executed it reside.

Reaffirmed and explained in Bradley & Nicolson v. Palen, 78 Iowa 128, 42 N. W. 624, holding that an action for breach of a written contract to purchase personal property, by failing to execute a note therefor at the place expressly provided by the contract, must—under Sec. 2581 of the Code of 1873, corresponding to Sec. 2798 of the Code of 1860—be brought in the county wherein the note was to have been executed.

Reaffirmed and explained in Bailey v. Birkhofer, 123 Iowa 61, 98 N. W. 595, holding that, under Sec. 4481 of the Code of 1897, an action on a promissory note must be brought in the county of the maker's residence, unless the note expressly provides for its payment elsewhere: And that where no place of payment is named in a note, it is presumed to be payable where the maker resides; and, where a bank is named, it will be presumed, in the absence of evidence appearing

on the face of the note to the contrary, that it was at the maker's home town.

Reaffirmed and explained in Haugen & Co. v. McCarnhey, 34 Iowa 417, 418; Moyers v. Council Bluffs Nursery Co., 125 Iowa 675, 676, 101 N. W. 509, holding that—under the Codes of 1860 and 1897—an action for breach of a written contract must be brought in the county wherein the defendant resides, unless the contract expressly provides for its performance in another county, in which case it must be brought in the latter.

And see 147 Iowa 28, 125 N. W. 803.

AMBLER v. CLAYTON, 23 IOWA 173

1. Taxes on Land—Entry Showing Payment, by Treasurer in His Books When They Are Not Paid—Effect—Estoppel.—The entry by a county treasurer in his books, showing that taxes on land have been paid, does not operate as a payment, if they, in fact, are not paid, and does not prevent the collection thereof, except in favor of an innocent purchaser or mortgagee who acted in reliance upon the truth of the entry, p. 175.

Reaffirmed in McCash v. Penrod, 131 Iowa 633, 109 N. W. 181.

EDDY v. HOWARD, 23 IOWA 175

1. Torts—Joint Tort Feasors—What Constitutes—Concerted Action.—In order to make parties jointly liable for the commission of a trespass or other tort, they must act in concert in relation thereto. The mere fact that certain persons are together at the time of the commission of a trespass, or other tort, is not sufficient to render all liable therefor, without proof of concerted action by them, p. 183.

Unreported citation, 72 N. W. 554.

WELCH v. BOARD OF SUPERVISORS, 23 IOWA 199

1. Laws—Publication of in Newspaper by County Board of Supervisors—Newspaper Owner Cannot Compel by Mandamus.—The owner of a newspaper cannot compel, by mandamus, the county board of supervisors to publish the laws of the General Assembly, as provided by Chap. 118, Acts of 1866, in the newspaper owned by him, p. 203.

Reaffirmed and extended in Smith v. Yaram, 37 Iowa 91, 92; Iowa News Co. v. Harris, 62 Iowa 502, 17 N. W. 746, holding further that in determining which county newspapers have the largest circulation and are therefore entitled to be awarded the contract to publish the proceedings of the board of supervisors and the session laws, the board is not confined to the affidavits filed, but may consider any extraneous facts known to its members and the action of such board on

such question will not be reviewed or corrected by *Certiorari* for any such cause.

Cited in McHenry v. Sneer, 56 Iowa 652, 10 N. W. 235, the court holding that the police judge of a city has no cause of action against the mayor and members of the council thereof, because they direct the police to make all arrests under the state law, and to report them to a justice of the peace; although this was done in an attempt to deprive the police judge of his fees, and to compel him to accept the provisions of a void ordinance fixing his salary.

Cited in Darling v. Boesch, 67 Iowa 704, 25 N. W. 888, the court holding that the action of the board of supervisors in granting a permit to manufacture, buy and sell intoxicating liquors may—under Sec. 1530 and other provisions of the Code of 1873—be reviewed and corrected by *Certiorari* upon application of any resident of the county.

Cited in Vincent v. Ellis, 116 Iowa 617, 88 N. W. 839, the court holding that mandamus does not lie to compel the county auditor to award the contract for the construction of a ditch to the lowest bidder.

Cited in Collins v. City of Keokuk, 108 Iowa 30, 78 N. W. 800, not in point, but upon analogy.

Distinguished in Brown v. Lewis, 76 Iowa 160-162, 40 N. W. 699, holding that under Chap. 197, Acts of Twentieth General Assembly, any publisher aggrieved by the decision of the board of supervisors in awarding the contract to publish its proceedings, may appeal to the district court; and that such appeal is not confined to cases where fraud is charged, as provided by such Act.

CRITES v. LITTLETON, 23 IOWA 205

1. **Actions—Appeal—Who May Appeal.**—Only parties to an action may appeal, p. 207.

Reaffirmed and qualified in Freeman v. Hart, 61 Iowa 527, 528, 16 N. W. 598, holding that one against whom a judgment is rendered, although he is not technically a party to the action, may move its correction, and appeal therefrom, to correct any error affecting himself only.

ELSTON & GREEN v. ROBINSON, 23 IOWA 208

1. **Homestead—Occupancy—Requisite to—To What Debts Subject.**—Actual occupancy and use as a home by the family of the party claiming it, are the essentials to a homestead.

Homestead is subject to the satisfaction of a debt created anterior to the time it is acquired by the debtor as above provided, p. 211.

Reaffirmed in Neal v. Co., 35 Iowa 409; First Nat'l Bank of Stewart v. Hollinsworth, 78 Iowa 576, 43 N. W. 537, 6 L. R. A. 92.

Distinguished and narrowed in Mann v. Corrington, 93 Iowa 111-113, 61 N. W. 409, 57 Am. St. Rep. 256, holding that homestead may

exist in vacant land purchased with money derived from a sale of a previous homestead, or received in exchange therefor, where such vacant land is held in good faith for use as a home.

Special cross reference. For further cases citing and qualifying the text, and others, see annotations under Rule 1 of Sargent v. Chubbuck (19 Iowa 37), Vol. II, p. 687.

Cross reference. See further on this question, annotations and cross references under Hale v. Heaslip (16 Iowa 451), Vol. II, p. 456.

GOURLEY v. CARMODY, 23 IOWA 212

1. Attachment—Petition and Bond in Action—Amendment.—Where, before dissolution of an attachment, the plaintiff asks leave to amend his petition in order to make it more specific and his bond as to the amount of penalty therein, such amendment must be allowed: And it is reversible error for the court to refuse such permission and thereafter dissolve the attachment for such defect, pp. 213, 214.

Distinguished in Bundy v. McKee, 29 Iowa 254, holding that where during the pendency of an attachment action, the plaintiff files an amended petition stating, in effect, that the defendant is about to dispose of his property, or has disposed of it, with intent, etc., such amendment is insufficient to sustain the attachment previously issued on a defective petition: That the averments of such amended petition must relate to the time of the filing the original petition and the asking of the attachment.

Cross references. See further on this question, annotations under Wadsworth & Wells v. Cheeney & Stinson, (13 Iowa 576), Vol. II, p. 190. See also, Sec. 3933 of the Code of 1897.

HAYS v. TURNER, 23 IOWA 214

1. Actions—Dismissal Without Prejudice and Non-Suit—At What Stage of Proceedings Not Allowed.—The plaintiff cannot—under Sec. 3127 of the Code of 1860—dismiss his action without prejudice or take a non-suit as a matter of Right after the final submission of the cause to the court or jury, pp. 216, 217.

Reaffirmed and explained in Mansfield v. Wilkerson, 26 Iowa 485, holding—as does the present case—that after a cause has been finally submitted to the court, it is too late for the plaintiff to take a non-suit as a matter of right; and that in such case it is not error for the court to refuse to allow him to so do.

Reaffirmed and explained in Ballinger v. Davis, 29 Iowa 514, holding that where the defendant interposes no cross demand or set-off, the plaintiff is entitled to dismiss his action as to one of several causes of action claimed, at any time before final submission to the court or jury.

Reaffirmed and explained in Oppenheimer v. Elmore, 109 Iowa 197, 198, 80 N. W. 307, holding that under Sec. 3764 of the Code of 1897, plaintiff may dismiss his action without prejudice to a future action, at any time before the final submission of the case to the jury, and that final submission to the jury is when the court directs it to enter upon the consideration of the case: Hence holding that where the issue is made up, the jury empaneled and sworn, and the evidence adduced by the plaintiff, that, pending a motion by defendant for the court to direct a verdict for him, the plaintiff may dismiss his action without prejudice.

Reaffirmed and extended in Gunsaulis v. Cadwallader, 48 Iowa 51, holding further that—under Sec. 2847 of the Code of 1860—the rule applies equally to the right of the defendant to dismiss his counterclaim after final submission of the cause.

Reaffirmed and extended in McArthur v. Schultz, 78 Iowa 367, 43 N. W. 224, holding further that, under Sec. 2844 of the Code of 1873, corresponding to the section of the text, it is reversible error for the trial court to permit plaintiff to withdraw any part of his cause of action, or to dismiss without prejudice, after the cause [in this case an action in equity] has been fully tried and submitted.

Distinguished and narrowed in Harris v. Beam, 46 Iowa 119, 120, holding that under Sec. 2844 of the Code of 1873, corresponding to the section of the text, plaintiff may dismiss his action without prejudice, upon a trial by jury, at any time before final submission to the jury, which final submission is, when the court directs the jury to enter upon the consideration of their verdict, either with or without retiring, and not when the final instructions or charge are or is read.

2. Pleading—Amendments—Discretion of Trial Court—Reversal for Abuse.—The trial court has a sound judicial discretion in the matter of granting or refusing to grant leave to amend pleadings, at any stage of the proceedings, in furtherance of justice, and his ruling on such a question will not be cause for reversal, except where the record upon appeal clearly shows that such discretion was abused, resulting in injustice to the party appealing, p. 217.

Reaffirmed in Emmerson & Co. v. Converse, 106 Iowa 331, 76 N. W. 705.

Reaffirmed and explained in Snediker v. Poorbaugh, 29 Iowa 489, holding that the matter of allowing or rejecting amendments is, to a very considerable extent, one of sound judicial discretion, and the rulings on such matters will only be interfered with by the Supreme Court where substantial prejudice has resulted to the party complaining.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations and cross references under Rule 1 of *Fulmer v. Fulmer* (22 Iowa 230), ante. p. 23.

CRUM *v.* LOUD, 23 IOWA 219

1. Deeds—Covenants in—General Not Limited by Special Warranty, When.—In the opinion of Wright, justice, not concurred in by the majority of the court, it is only when the intention to restrain or limit a preceding general covenant of warranty by a subsequent limited or special covenant in a deed, clearly appears from the instrument itself, or when they are clearly inconsistent that such an effect will be given to the instrument, and the grantor's liability is thereby narrowed, p. 227.

Cited in *Duroe & Conley v. Stephens*, 101 Iowa 361, 70 N. W. 610, the court holding that a special warranty following a general covenant against incumbrances in a deed, will not limit the latter.

CHURCHILL *v.* MORSE, 23 IOWA 229, 92 AM. DEC. 422

1. Judgment Lien on Land—To What Interest It Attaches—Prior Unrecorded Deed, Mortgage or Equity.—A judgment is a lien upon the judgment debtor's interest, legal or equitable, in land at the time of its rendition; but such lien is inferior to the rights of the grantee in a prior unrecorded deed or mortgage, or holder of a prior unrecorded equity to or in any such land, p. 231.

Reaffirmed in *First Nat'l Bank of Tama City v. Hayzlett*, 40 Iowa 659; *Zion Church of the Evangelical Ass'n v. Parker*, 114 Iowa 8, 9, 86 N. W. 63.

Reaffirmed and extended in *Spaan v. Anderson and Oertel Bros.*, 115 Iowa 123-125, 88 N. W. 201, holding further that the lien of the judgment creditor on the debtor's interest in land as heir or devisee of his deceased father does not take priority over advancements, and, if at the time his share in the estate would otherwise vest in him, he has already received such share by way of advancement, the lien of the judgment does not attach; and such lien will be subject to any equitable claim which may arise in the settlement and distribution of his father's estate: Holding further that where a widow is devised certain land for life, with power of disposal, with contingent remainder over to the sons of the testator, and, before the rendition of a judgment against one of the sons and in good faith, she sells a portion of the realty and pays the son against whom the judgment is later rendered a sum *in full of his interest in the devised land*, which arrangement or transaction is ratified and acquiesced in by the other sons or contingent devisees, such subsequent judgment creditor acquires no lien on the residue of the land by his judgment.

Reaffirmed and extended in *Witmer v. Shreves*, 141 Iowa 498, 120 N. W. 87, holding further that a purchaser of land at an execution

sale, to which the execution debtor had no title, legal or equitable, at the time of the rendition of the judgment, or when it was levied upon and sold thereunder, obtains nothing by his purchase.

Cross references. See Rule 2 hereof. See further on this question, annotations and cross references under *Evans v. McGlasson* (18 Iowa 150); *Welton v. Tizzard* (15 Iowa 495). Vol. II, pp. 601, and 371, respectively.

2. Execution Sale of Land—Purchaser of Equity—Rights of—Innocent Purchaser from Judgment Debtor.—One who purchases an equity of a judgment debtor in land at an execution sale, takes subject to the rights of a prior good faith purchaser, for value, from the judgment debtor, pp. 233, 234.

Special cross reference. For cases citing the text, and others in this connection, see annotations under Rule 2 of *Norton et al, v Williams* (9 Iowa 528), Vol. I, p. 620.

Cross references. See Rule 1 hereof, and cross references there found. See further on this question, annotations under Rules 1 & 2 of *Lathrop v. Brown* (23 Iowa 40), ante. p. 79; *Vannice v. Bergen* (16 Iowa 555), Vol. II, p. 472.

KEAS v. BURNS, 23 IOWA 235

1. Lands—Occupying Claimants—Right to Pay for Improvements—Nature of Possession Required.—In order to establish a right to pay for improvements under our occupying claimant law, it is essential that the possession under and during which the improvements are made, shall be adverse to the holder of the paramount title, p. 236.

Special cross reference. For cases citing and explaining the text, and many others, see annotations under Rule 2 of *Parsons v. Moses* (16 Iowa 440), Vol. II, p. 454.

LANE v. WILSON, 23 IOWA 240

1. Justice's Court—Writ of Error—Return the Basis of Action on.—It is the return to the writ of error which is the basis upon which the court must act, and not statements in the affidavit therefor, p. 241.

Reaffirmed and extended in *Herald Printing Co. v. Walsh*, 127 Iowa 503, 103 N. W. 474, holding further that a question not raised in a justice's court cannot be reviewed upon writ of error.

And see 146 Iowa 66, 124 N. W. 764.

Cross references. See further on this question, note to *Vance v. Kirfman* (20 Iowa 13), Vol. II, p. 769. See, also, Secs. 4574, 4575 of the Code of 1897.

2. Justice's Court—Writ of Error—When and When Not Allowed—Appeal.—A writ of error is allowed, under the Code of 1860,

to any person aggrieved by an erroneous decision of a justice's court *in a matter of law*; but is not allowed from a final, though erroneous decision of a justice upon the evidence—Appeal being the remedy in this latter case, p. 242.

Reaffirmed and explained in State v. Roney, 37 Iowa 32; Lease v. Franklin, 84 Iowa 415, 51 N. W. 22; Anthes v. Booser and Ullman Co., 112 Iowa 513, 84 N. W. 516; Doolittle & Co. v. Porter, 145 Iowa 387, 124 N. W. 180, all holding, under the various codes, that a writ of error cannot be used to review the findings of a justice of the peace on an issue of fact.

Cross reference. See further, Sec. 4569 of the Code of 1897.

3. Appeal from Justice's Court—Appeal Bond—Justice May Require Affidavit of Surety.—Before the justice approves an appeal bond, he may require the surety thereon to make an affidavit that he (the surety) is worth the penalty of the bond, over and above his debts and exemptions; and the justice may refuse to approve the bond until the affidavit is made, p. 243.

Distinguished in Porter v. Western Un. Tel. Co., 133 Iowa 749-751, 12 Am. & Eng. Ann. Cas. 585, 111 N. W. 323, holding that although a justice may require sureties to an appeal bond to make affidavit to their financial ability, or, upon their failure or refusal may refuse to approve the bond, yet if the justice approves the bond with one or more otherwise competent sureties thereon, without requiring such an affidavit, or upon an insufficient affidavit, such a fact will not be cause for dismissal of the appeal: But, says the court, this may make the justice and the sureties on his official bond, liable by reason of damages sustained from the taking of an insufficient bond, if such be the case.

RUDDICK v. MARSHALL, 23 IOWA 243

(Later Appeal, 28 Iowa 487.)

1. Practice—Pleading—Demurrer—Exhibits Filed With—Effect.—Exhibits filed with a demurrer do not add to its efficiency or affect in any way the questions thereby raised, pp. 245, 246.

Reaffirmed and explained in Jefferies v. Fraternal Bankers' Reserve Society, 135 Iowa 289, 112 N. W. 788, 14 Am. & Eng. Ann. Cas. 346, holding that a demurrer cannot be properly sustained unless the objection is apparent on the face of the pleading demurred to.

CITY OF DUBUQUE v. BENSON, 23 IOWA 248

1. Municipal Corporations—Dedication of Streets, Etc.,—Right to Minerals Under.—Where the owner of mineral land dedicates streets and alleys over it, declaring in the dedication that "the streets and alleys are dedicated for street purposes and those only," the city

has no right to the mineral under them, but such right remains in the Dedicator, pp. 249, 250.

Special cross reference. For cases citing, sustaining and distinguishing the text, and many others on the question, see annotations under *City of Dubuque v. Maloney* (9 Iowa 450), Vol. II, p. 606.

Cross reference. See further in this connection, annotations under *Milburn v. City of Cedar Rapids, et al.* (12 Iowa 246), Vol. II, p. 40.

MANNY & CO. v. FRENCH, 23 IOWA 250

1. Pleading—Answer—Inferential Denial—What Insufficient.—Denial in an answer of *information* sufficient to form a belief of allegations in the petition is insufficient.

Such a denial must—under Sec. 2880 of the Code of 1860—be as to both knowledge or information sufficient to form a belief, in order to raise an issue, pp. 251, 252.

Reaffirmed in *McPhail & Co. v. Hyatt*, 29 Iowa 139; *Cutler & Parker v. McCormick, Hall & Porter*, 48 Iowa 415; *Claffin v. Reese*, 54 Iowa 545, 546, 6 N. W. 730; *Leyner v. Fuller*, 67 Iowa 189, 25 N. W. 124, the last three cases being under the Code of 1873.

Cross reference. See further on this question, Sec. 3566 of the Code of 1897.

WILSON v. SMITH, 23 IOWA 252

1. Bonds—Attachment—Indemnity Bond to Save from Damages and to Save from Liability—Difference Between—When Obligee May Sue.—An obligee, sheriff, in an indemnity bond in an attachment action, conditioned to save him harmless from *all damages* by reason of his levying upon certain property, cannot maintain an action thereon until judgment for damages has been rendered against him, and he has either paid the judgment or has given his notes or made other arrangements equivalent to payment.

But if such a bond is conditioned to save the obligee from *liability*, he can then sue before judgment is rendered against him, and before payment, etc., pp. 255, 256.

Reaffirmed as to first paragraph in *Cousins, sheriff v. Paxton & Gallagher Co.*, 122 Iowa 468, 98 N. W. 278.

Reaffirmed and extended as to last paragraph in *Seeberger v. Wyman, receiver*, 108 Iowa 530-532, 536, 537, 79 N. W. 293, holding further that when one in order to induce a surety to sign a purchase money bond for property sold by a receiver, executes a bond to the surety to indemnify him from liability, and the bond to the receiver provides that the purchase money be paid as and when the court orders and directs, then, upon the court ordering it paid, the surety may sue on his indemnity bond before judgment is rendered against him for the amount of the receiver's bond.

Reaffirmed and varied as to first paragraph in Cushman v. Carbon-dale Fuel Co., and London Guarantee & Accident Co., 122 Iowa 657, 658, 98 N. W. 509, holding that where a guaranty company enters into a contract with one who works men in hazardous employment, agreeing to save the latter from loss by reason of accidents, or personal injuries to his employes, and conditioned that "no action should lie against the company for loss under the contract, unless brought by the assured himself to reimburse him for loss actually sustained and paid in satisfaction of a judgment after trial of the issue," then the person insured or indemnified cannot sue the guaranty company for any loss until after loss *actually sustained and paid in satisfaction of a judgment after trial of an issue*; nor can one sustaining an accident or personal injury as an employe of insured, sue on such contract.

HUGHES v. FUNSTON & SMITH, 23 IOWA 257

1. Sales of Personal Property—Warranty, What Constitutes.—Any distinct assertion or affirmation of quality, made by the owner during a negotiation for the sale of chattels, which, it may be supposed was intended to cause the sale, and was operative in causing it, will constitute a warranty; and the question whether the particular affirmation amounts to a warranty is one of fact for the jury; and it is not necessary that the word "warrant" be used by such owner, p. 259.

Reaffirmed in Callanan v. Brown & Co., 31 Iowa 338.

Reaffirmed and explained in Figge v. Hill, 61 Iowa 432, 16 N. W. 340, holding that the question whether there has been a warranty or not depends upon the understanding of the parties, as collected from their acts and expressions at the time of sale; and when the contract is not wholly in writing, is one of the facts for the jury, under the direction of the court.

Reaffirmed and explained in Conkling v. Standard Oil Co., 138 Iowa 603, 604, 116 N. W. 825, holding that a warranty arises when there is a distinct assertion or affirmation of fact—which is relied upon—respecting the quality of the goods, or the adaptability thereof to the purpose for which they are desired.

Reaffirmed and extended in Eagle Iron Works v. Des Moines Suburban Ry. Co., 101 Iowa 295, 296, 70 N. W. 195, holding further that a warranty may arise both in executed and executory sales of personal property, the warranty attaching in the latter upon the delivery of the property.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

2. Sales of Personal Property—Fraud and Warranty—Action Upon Both Causes of Action.—A warranty in the sale of personal property as set out in Rule 1 may, also, constitute fraud when the

statements or representations were known to be false at the time they were made; and in this case the buyer may sue both on the warranty and for the fraud in the same action, pp. 259, 260.

And see 147 Iowa 100, 122 N. W. 142, citing this rule.

McFARLAND, DODGE & Co. v. LESTER, 23 IOWA 260

1. **Pleading—Answer—Inferential Denial.**—An answer which merely avers that "of the truth of no allegation contained in the petition have the defendants' knowledge or information sufficient to form a belief, wherefore they ask that petitioners be required to prove the same," raises an issue under Sec. 2880 of the Code of 1860, p. 261.

Special cross reference. For cases citing, explaining and qualifying the text, and others, see annotations under *Manny & Co. v. French* (23 Iowa 250), ante. p. 100.

SHINE, TRUSTEE, v. HILL, 23 IOWA 264

1. **Trustee Deed—Sale of Land Under—Gross Inadequacy of Purchase Price as Ground to Set Aside—Innocent Purchasers.**—Even if it be admitted that gross inadequacy of price alone would justify in any case the setting aside of a trustee's sale, and that a sale for one-third of the value would constitute such gross inadequacy, still, it would be against principle to grant relief upon this ground, where the original purchaser was a stranger to the transaction, and the bill to question the sale is not filed until the premises have in good faith been bargained and sold to another, p. 267.

Reaffirmed in Hill v. Baker, 32 Iowa 307, 308, 7 Am. Rep. 193.

Reaffirmed and extended in Ingle v. Jones, 43 Iowa 293, holding further that gross inadequacy of price of land sold under a deed of trust will not of itself, and in the absence of fraud vitiate the sale.

Cross references. See further on this question, annotations under Rule 3 of Cavender v. Heirs of Smith (1 Iowa 306), Vol. I, p. 185.

See also, annotations and cross references under Singleton v. Scott (11 Iowa 589), Vol. I, p. 865.

WEBSTER & GAGE v. REES, 23 IOWA 269

1. **Evidence—Foreign Statutes, How Proved.**—A volume purporting to contain the statute laws of a foreign state, having the usual certificate of authenticity printed therein, and showing that it was published by the state printers thereof, is admissible, under Sec. 4063 of the Code of 1860, as presumptive evidence of such laws, p. 270.

Reaffirmed and explained in Summit, Adm'x v. United States Life Ins. Co., 123 Iowa 684, 685, 99 N. W. 565, holding that a printed volume purporting to be the statute laws of a foreign state, and containing the printed certificate of the secretary of state thereof, that it was printed under his direction, is admissible—under Sec. 4651 of the Code of 1897—as presumptive evidence of such laws.

2. Limitation of Actions—Cause of Action on Contract Proved Just by Defendant's Evidence, Not Within Statute—Sufficiency of Proof for.—In order to avoid the statute of limitation in an action on a contract, as provided by Sec. 2742 of the Code of 1860, it must appear affirmatively from the evidence of the defendant *alone*, that the cause of action still justly subsists, pp. 271, 272.

Reaffirmed in Stewart v. McMillan, 34 Iowa 457.

Cross reference. See further in this connection, annotations under Rule 1 of Hunt v. Coe and Wells (15 Iowa 197), ante. p. 325.

3. Contracts—Contract Made in Foreign State, Insolvent Laws of are Part of Contract.—The insolvent laws of a foreign state are to be taken as part of a contract made therein, p. 272.

Unreported citation, 60 N. W. 238.

STATE v. O'NIEL, 23 IOWA 272

1. Murder—Indictment, Allegations of.—An indictment for murder under our Code of 1860, need not charge that the accused *killed and murdered* deceased, if words equivalent thereto are employed, and the crime is charged in ordinary language so as to enable a person of common understanding to know what is intended, p. 274.

Reaffirmed in State v. Stanley, 33 Iowa 532.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

WHITE v. KELLEY, 23 IOWA 275

1. Equitable Action—Default, Trial of—Appeal—Insufficient Record—Affirmance.—Where in an equitable action triable by the first method provided by Secs. 2999 and 3000 of the Code of 1860, the defendant makes default, the court may try it according to the second method; and if, upon appeal, there is nothing to show upon what evidence the cause was heard below, the judgment will be affirmed, p. 277.

Reaffirmed in Pierce v. Herrold, 83 Iowa 765 (abstract), 49 N. W. 1042.

Cited in Pool v. Paul, 23 Iowa 424, not in point.

McDOLE v. PURDY, 23 IOWA 277

1. Contracts—False Representations—Action for—Measure of Damages.—In an action for false representations inducing a purchase of land, the plaintiff is entitled to recover the difference between the actual value of the land and what it would have been worth if it had been as represented, p. 284.

Reaffirmed in Wilson v. Yocum, 77 Iowa 573, 574, 42 N. W. 448; Stanhope v. Swafford, 77 Iowa 596, 42 N. W. 451.

Cross reference. See further on this question, annotations under Rule 1 of *Gates v. Reynolds* (13 Iowa 1), Vol. II, p. 107.

2. Contracts for Exchange of Land—False Representations—Action for—Lien on Land for Damages.—Where a person conveys land in exchange for other land, and the owner of the latter is guilty of false representations as to the quality of the land that he exchanges, which representations induces the first mentioned party to execute the conveyance, then in an action in equity for fraud and false representations by the latter, the plaintiff is entitled to a lien on the land he conveyed to defendant for the damages sustained, p. 284.

Reaffirmed in *Newburn v. Lucas*, 126 Iowa 89, 101 N. W. 732.

3. Vendor's Lien in Equity—Waiver Procured by Fraud.—In equity an unpaid vendor who has not waived it will be entitled to a lien, and no waiver obtained by fraud will be effectual to destroy it, p. 285.

Reaffirmed in *Brown v. Dyam*, 65 Iowa 380, 21 N. W. 687.

Distinguished in *Kendrick v. Eggleston*, 56 Iowa 131, 132, 8 N. W. 788, 41 Am. Rep. 90, holding that where a vendor takes collateral security to secure the purchase price of land, the fact that such security afterwards becomes worthless does not entitle him to then enforce a vendor's lien.

Unreported citation, 82 N. W. 1005.

Special cross reference. For further cases citing the text, and others on the question, see annotations under Rule 1 of *Porter v. City of Dubuque* (20 Iowa 440), Vol. II, p. 840.

4. Practice—Action on Wrong Side of Docket No Cause for Dismissal.—Because an action is brought in equity when it should have been brought at law, or *vice versa*, is no cause for dismissal under the Code of 1860, p. 284.

Reaffirmed and extended in *Gray v. Coan*, 23 Iowa 353, holding further that the irregularities set out in the text, is no ground for demurrer.

Cross reference. See further on this question, annotations under *Conyngham v. Smith* (16 Iowa 471), Vol. II, p. 458:

FARR v. JOHN, 23 IOWA 286, 92 AM. DEC. 426

1. Auction Sales—Seller May Prescribe Conditions, Etc.—The owner of property offered for sale at auction has the right to prescribe the manner, conditions and terms of sale, and where these are reasonable and made known to the buyer, they are binding upon him, and he cannot acquire a title in opposition to them, and against the consent of the owner, p. 288.

Reaffirmed and extended in *Kennell v. Boyer*, 144 Iowa 305, 306, 1912 A, Am. & Eng. Ann. Cas. 1127, 122 N. W. 941, holding further that when an auctioneer, at the time of sale, announces the terms and

conditions under which property will be sold, one who buys thereat is thereby bound, although he did not hear the announcement or know of the terms and conditions: Holding, also, that the formal written terms under which an auction sale is advertised may be modified or added to by the auctioneer at the beginning of the sale.

SWEENEY v. DAUGHERTY, 23 IOWA 291

1. Res Adjudicata—All of a Cause of Action to be Adjudicated in One Action.—A party cannot set up an entire and indivisible claim and sue upon it in different actions; and the judgment in the first action in such case will be a bar to the subsequent one, pp. 294, 295.

Reaffirmed and explained in Kenyon v. Wilson, 78 Iowa 409, 410, 43 N. W. 228, holding that an adjudication is final and conclusive of all matters in a case which the parties could have presented to the court for adjudication in the case: That a party must litigate in one action all matters growing out of his causes of action, upon which a remedy may be sought.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

REDMAN & FEAR v. MARVIN & CLOUD, 23 IOWA 296

1.—Trial—Instructions—General Exceptions to—Review on Appeal, When Not Allowed.—General exceptions to instructions given to the jury will not authorize a review of specific errors therein, when any are correct, pp. 297, 298.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Rule 5 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), Vol. II, p. 140.

2. Pleading—Set-off—What May be Pleaded as.—The defendant may plead as set-off, damages caused to him by violation of a contract on which the plaintiff and others were jointly bound, p. 299.

Special cross reference. For cases citing the text, and others, see annotations under Ryerson v. Kendrie (22 Iowa 480), ante. p. 59.

VAN ORMAN v. MCGREGOR, 23 IOWA 300

1. Evidence—Execution of Conveyance—Acknowledgment.—The certificate of acknowledgment to a conveyance is, although not conclusive, very strong evidence of the fact of execution, p. 302.

Special cross reference. For cases citing, sustaining, etc., the text, and others on the question, see annotations under Morris v. Sargent (18 Iowa 90), Vol. II, p. 590.

STATE v. LOVELL, 23 IOWA 304

1. **Criminal Law—Resisting an Officer in Making Arrest.**—Resisting an officer who is attempting to make an arrest without a warrant, is not a criminal offense under Sec. 4296 of the Code of 1860, p. 305.

Overruled in State v. Putnam, 35 Iowa 562, 563, holding that under the section of the text, as amended by Chap. 150, Acts of 1868, it is a criminal offense to knowingly and willfully resist an officer in the discharge of his duties who is acting without or under a writ, rule, order or process, provided the officer who is resisted has the power to execute a writ, rule, order or process.

2. **Criminal Law—Criminal Statutes Not to be Enlarged by Construction.**—Statutes defining or denouncing crimes or offenses are not to be enlarged by construction so as to include cases without their letter, although within their Reason and Policy, p. 305.

Reaffirmed in State v. Julien, 48 Iowa 447; Hanks v. Brown, 79 Iowa 563, 44 N. W. 812; State v. Hayes, 98 Iowa 625, 67 N. W. 676, 60 Am. St. Rep. 219, 37 L. R. A. 116; Kuhn v. Kuhn, 125 Iowa 452, 101 N. W. 152, 2 Am. & Eng. Ann. Cas. 657, applying the rule to all criminal and penal statutes, and those imposing forfeitures.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

McCABE v. KNAPP, STOUT & CO., 23 IOWA 308

1. **New Trial—Evidence Conflicting—Refusal of Trial Court to Grant New Trial—Appeal—Affirmance.**—Where the evidence upon a jury trial was conflicting, without a preponderance in favor of either, and the trial court refuses to grant a new trial, because the verdict was contrary to the evidence, the judgment will be affirmed upon appeal, pp. 313, 314.

Reaffirmed and explained in Conner v. Mountain, 28 Iowa 593 (abstract), holding that when the evidence is conflicting and the trial court refuses to interfere with the verdict, there must, in order to justify a reversal, be a very strong case of abuse of discretion, or prejudice to appellant's substantial rights.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations and cross references under *Shepherd v. Brenton* (15 Iowa 84), Vol. II, p. 308.

STATE v. GIGHER, 23 IOWA 318

1. **Criminal Law—Witnesses—Co-Defendant Competent.**—Where two or more defendants are jointly indicted, they are competent witnesses for or against each other, whether they are tried jointly or

separately, under Sec. 3978 of the Code of 1860; but as, under Sec. 3981 of that Code, a defendant in a criminal case is not a competent witness either for or against himself, his evidence must be confined to the issue of the co-defendant for or against whom he testifies, pp. 319, 320.

Reaffirmed in State v. Donovan, 41 Iowa 587, 588, under the Code of 1873.

Reaffirmed and extended in State v. Hardin and Henry, 46 Iowa 626-628, 26 Am. Rep. 174, holding further that, under the Code of 1873, when a person jointly indicted testifies for or against his co-defendant, his general moral character may be testified to for the purposes of impeachment, as in the case of any other witness.

(Note.—See further, State v. Hogan, 115 Iowa 460, 88 N. W. 1075, an important case on this subject, not citing the text.—Ed.)

Cross reference. See further, in this connection, Secs. 5483-5485 of the Code of 1897.

SWEATT v. FAVILLE, 23 IOWA 321

1. **Removal of County Seat—Election for—Injunction to Restrain Proceedings under.**—If an election for the removal of a county seat is held without authority, or if there is any fraud or illegality sufficient to invalidate it, proceedings thereunder may be enjoined upon complaint of any citizen, voter and tax payer of the county, the petition therefor, also, praying that the election be declared void, pp. 326-328.

Special Cross reference. For cases citing the text, see annotations under Rice v. Smith (9 Iowa 570), Vol. I, 630.

2. **Limitation of Actions—Injunction—When Action Deemed Commenced.**—When by an injunction parties are restrained from committing a threatened wrong or act, the action is commenced within the meaning of the statute of limitation at the time the writ is served, and such an action is not barred, although the writ is served *after* the statutory period of limitation, if the writ is served before the expiration thereof, pp. 329, 330.

Cited in Fritz v. Fritz, 93 Iowa 30, 61 N. W. 170, the court holding that the filing of a claim against the estate of a decedent in the office of the clerk of the district court having jurisdiction, is the commencement of an action thereon, and suspends the running of the statute of limitation against such claim.

Cited in Lesure Lumber Co. v. Mut. Fire Ins. Co., of N. Y., 101 Iowa 520, 70 N. W. 763, the court holding that where in an action on an insurance policy the defendant is not served with original notice, but enters his appearance, the action is not deemed to be *commenced* until such appearance is entered.

Cited in Smith v. Callanan, 103 Iowa 223, 72 N. W. 515, 42 L. R. A. 482, the court holding that Sec. 2532 of the Code of 1873, in

reference to when an action is deemed to be commenced within the meaning of the general chapter of that code as to limitation of actions, applies to limitations of other actions found in other chapters of that code, as determining what shall constitute the commencement of the action.

Cited in Hawley v. Griffin, 121 Iowa 699, 97 N. W. 89, the court holding that Chap. 2, Title 18, of the Code of 1897, has reference to limitation of actions, and not to time limits which inhere in a cause of action, either by contract or by statute.

And see 148 Iowa 417, 126 N. W. 926.

WILSON v. TRIBLECOCK, 23 IOWA 331

(Reversed on Appeal to Supreme Court of the United States, 12 Wall. 687, 20 Law. Ed. 460.

1. Contracts—Constitutional Law—United States Treasury Notes Legal Tender.—The Act of Congress of July 16, 1862, making United States Treasury Notes legal tender, is constitutional; and such notes are legal tender in payment of all contracts and debts, whether made before or after the passage of the Act, pp. 332, 333.

Reaffirmed in Richmond v. Dubuque & Sioux City R. R. Co., 33 Iowa 503.

BEHRENS v. MCKENZIE, 23 IOWA 333, 92 AM. DEC. 428

1. Injunction Bond—Action on—Damages—Attorney's Fees.—In an action on an injunction bond for the wrongful issuance of the writ, the plaintiff may recover as part of his damages, a reasonable compensation to an attorney to procure a dissolution of the writ, or a release of the property; but plaintiff cannot recover for his attorney's fees for other services in the injunction action, p. 342.

Reaffirmed, varied and extended in Peters, et al, v. Snively-Ash-ton 144 Iowa 162, 163, 122 N. W. 837, holding that in an action on an attachment bond for the wrongful suing out of the attachment, the plaintiff may recover as damages, a reasonable attorney's fee incurred by him in procuring the discharge of the writ, and the release of the attached property, and may—under Sec. 3887 of the Code of 1897—be allowed by the court reasonable attorney's fee in prosecuting the action for damages: And that this rule applies where the defendant files a counter claim and cross action on the bond for such damages, in the attachment action.

Reaffirmed, varied and qualified in Plumb v. Woodmansee, 34 Iowa 122, holding that where in an attachment action, the defendant files a counterclaim and cross action on the attachment bond claiming damages by reason of the wrongful suing out of the writ, he cannot recover thereon, as damages, an attorney's fee in defending the action or in prosecuting his claim.

Reaffirmed and qualified in Langworthy v. McKelvy, 25 Iowa 51; Ford v. Loomis, 62 Iowa 588, 16 N. W. 194; Bullard v. Harkness, 83 Iowa 375, 49 N. W. 855; Leonard v. Capital Ins. Co., 101 Iowa 484, 70 N. W. 630, holding, however, that when injunction is the only object of the first action, the defendant who sues on the bond is entitled to recover all reasonable attorney's fees incurred in the first action.

Reaffirmed and qualified in Wallace v. York, 45 Iowa 83, 84, holding that where injunction is auxiliary to an action, the defendant who sues on the bond is entitled to recover all reasonable attorney's fees incurred in a *good faith effort* to have the injunction dissolved.

Reaffirmed and qualified in Bullard v. Harkness, 83 Iowa 375, 376, 49 N. W. 855; Leonard v. Capital Ins. Co., 101 Iowa 483, 484, 70 N. W. 630, holding that where an injunction is merely auxiliary to the first action, the defendant who sues on the injunction bond cannot recover attorneys' fees for services of attorneys in the first action which were not incurred or done in procuring the dissolution of the injunction.

Unreported citation, 98 N. W. 367.

Cross reference. See further in this connection, Rule 2 of Campbell v. Chamberlain (10 Iowa 337), Vol. I, p. 698.

2. Insane Persons—Civil Liability for Torts.—Insane persons are liable civilly for torts and trespasses committed by them, p. 343.

Distinguished in Wertz v. Wertz, 43 Iowa 536, holding that insanity of one consort occurring after marriage, is no ground for divorce; nor is cruel and inhuman treatment by such insane consort of the other, a ground therefor.

3. Contracts—Insanity—When Does Not Invalidate.—Insane persons and those mentally incapable of contracting are liable upon executed contracts which are fair and reasonable, and are made in the ordinary course of business, and when the insanity or mental incapacity is not known to the other contracting party, and the parties cannot be placed in *statu quo*, p. 343.

Reaffirmed in Ashcraft v. DeArmond, 44 Iowa 234, 235; Abbott v. Creal, 56 Iowa 177, 9 N. W. 116; Alexander, by Guardian v. Haskins, 68 Iowa 74, 25 N. W. 936; Harrison v. Otley, 101 Iowa 659, 70 N. W. 726; Watters v. McGreavy, 111 Iowa 542, 82 N. W. 950.

Reaffirmed and qualified in Warfield v. Warfield, 76 Iowa 635, 41 N. W. 384; Swartwood, Gd'n v. Chance, 131 Iowa 715, 109 N. W. 298, holding that where the parties can be placed in *statu quo*, a deed or other contract will be set aside in equity on the ground of the insanity of one of the parties thereto, upon the complaint of the guardian of the insane person, or upon his complaint after he is restored to sanity.

Reaffirmed and narrowed in Allen v. Berryhill, 27 Iowa 536-539,

1 Am. Rep. 309, holding that one contracting with an insane or mentally unsound person cannot plead the insanity or incapacity of that person when sued on the contract; but that insanity or mental incapacity is a defense to the person afflicted or his representative when sued on a contract, and not to the other party to such a contract.

GRAY v. COAN, 23 IOWA 344

(Later Appeals, 30 Iowa 536; 40 Iowa 327.)

1. Tax Deed to Land—Action in Equity to Set Aside—Redemption by Owner from Tax Sale Before Execution of Tax Deed.—Where in an action in equity to set aside a tax deed to land the plaintiff's petition avers ownership of the land at the time of the sale and at all times thereafter and that he had redeemed from the tax sale thereof before the execution by the county treasurer of the deed, it states a cause of action, p. 353.

Reaffirmed in Fenton v. Way, 40 Iowa 197.

2. Pleading—Construction of Pleadings.—In the construction of a pleading for the purpose of determining its effect, its allegations will, under Sec. 2951 of the Code of 1860, be liberally construed with a view to effectuating substantial justice between the parties, p. 354.

Reaffirmed in Foster v. Elliot, 33 Iowa 223; Lampman v. Buning, 120 Iowa 170, 94 N. W. 563, this last case holding that the rule is the same under the Code of 1897, although the section of the text is not therein contained.

IN RE WILL OF BOYENS, 23 IOWA 354

1. Wills—Witnesses to.—Under Secs. 2311, 2313 of the Code of 1860, a will bequeathing personal property of the value of more than three hundred dollars, and all other wills except those to the value of three hundred dollars of personal property, must be in writing; and all wills required to be in writing are not valid, and will not be admitted to probate, unless the instrument was attested by two competent persons subscribing their names as witnesses thereto, pp. 355, 357, 359.

Reaffirmed and extended in McCarn v. Rundall, and Foos, 111 Iowa 408, 82 N. W. 925, holding further that under Sec. 3274 of the Code of 1897, two witnesses must subscribe a will to make it valid: That in order to admit a will to probate, it must be proven that it was executed with the formality required by statute.

MEYER v. MEYER, 23 IOWA 359, 92 AM. DEC. 432

1. Descent and Distribution—Dower and Homestead of Widow—Widow Cannot Have Both.—Where after the death of her

husband who dies seized of homestead and other lands, and who devised the homestead to his sons by name, the widow causes her dower or distributive share to be allotted to her in the dwelling house and part of the acreage of the homestead, she cannot thereafter, as against the sons or devisees, claim the residue of the homestead acres, as homestead, p. 374.

Reaffirmed and explained in Butterfield v. Wicks, 44 Iowa 312, 313; Whitehead v. Conklin, 48 Iowa 480; Smith v. Zuckmeyer, 53 Iowa 15, 3 N. W. 783; Conn v. Conn, 58 Iowa 748, 13 N. W. 52; Hornbeck v. Hornbeck, 91 Iowa 321, 59 N. W. 35, holding that the surviving consort cannot have both homestead and dower in the lands of the decedent, but is put upon election of one or the other.

Reaffirmed and extended in Butterfield v. Wicks, 44 Iowa 312, 313; Smith v. Eaton, 50 Iowa 490, holding further that where a surviving husband continues to occupy homestead of his deceased wife as his home, and does not claim an election of his distributive share, it will be presumed that he elects to take homestead; and a mortgage thereon is of no effect.

Reaffirmed and extended in Briggs v. Briggs, 45 Iowa 320, 321, holding further that when a widow elects to take her distributive share, and it is carved out of the original homestead, whereupon she continues to occupy such share as a homestead, the latter partakes of the character of the original homestead, and is exempt from prior debts—But see Askwith v. Doerscher, 105 Iowa 394, 75 N. W. 331, (reaffirming the text), holding that a widow cannot take her distributive share free from her debts, and invest it in a new home—And see Edinger v. Bain, 125 Iowa 393, 98 N. W. 568, (reaffirming the text), holding that where the widow elects to take her distributive share in money from the proceeds of lands which include homestead of her decedent husband, real property thereafter purchased by her with such money is not exempt because purchased with the proceeds of a prior homestead.

Reaffirmed and qualified in Wilson v. Hardesty, 48 Iowa 517, 518, holding that if a widow elects to take her distributive share in her decedent husband's realty, she takes free from his debts; and that where such realty and other property was previously mortgaged, all the other property included in the mortgage must be exhausted before her distributive share may be subjected to its satisfaction.

Cited in Stewart v. Brand, 23 Iowa 481, 483, the court holding that a wife may, under Sec. 2298 of the Code of 1860, devise her land subject to the surviving husband's right to homestead therein, under Sec. 2278 of that Code, as long as he continues to occupy it as a home; and that such devisee may mortgage the land, subject to such surviving husband's right to homestead.

Cited in Size v. Size, 24 Iowa 581, the court holding that where a

husband dies seized of the fee simple title to homestead and leaving a widow and issue, the homestead descends to the heirs at law, subject to the right of the widow to use and occupy it as homestead: That in such case the widow has no right to sell or convey the fee simple title to the homestead; and such acts on her part constitute an abandonment, and entitle the heirs at law to maintain an action for partition thereof.

Cited in Stephens v. Hay, 98 Iowa 45, 66 N. W. 1051, (dissenting opinion), the majority court opinion turning on the sufficiency of evidence requisite to establish an election of a widow to take her distributive share, by her acts and conduct.

And see 148 Iowa 113, 126 N. W. 965.

Special cross reference. For further cases citing the text, and others in this connection, see annotations under Rule 1 of Burns v. Keas (21 Iowa 257), Vol. II, p. 900.

2. Descent and Distribution—Homestead—Nature of.—Sec. 2295 of the Code of 1860, gives to the surviving consort a right to continue to possess and occupy the homestead owned by the deceased one, but does not confer title thereto upon the survivor, p. 370.

Reaffirmed and extended in Butterfield v. Wicks, 44 Iowa 312, 313; Smith v. Eaton, 50 Iowa 590, holding further that where a surviving husband continues to occupy homestead of his deceased wife as his home, and does not claim an election of his distributive share, it will be presumed that he elects to take homestead; and a mortgage thereon is of no effect.

Reaffirmed and extended in Piekenbrock & Sons v. Knoer, 136 Iowa 542, 114 N. W. 203, holding further that the right to possession and occupancy which the surviving consort has in reference to homestead which belonged to the decedent consort, is not an estate in the property, and confers no title which can be conveyed to another or which can become subject to the lien of a judgment.

Cited in Fullerton v. Sherrill, 114 Iowa 516, 87 N. W. 421, the court holding that the homestead is for the benefit of the family of the debtor, and not for his benefit alone; and that the homestead exemption is not an estate, but a mere right or privilege, though of much value.

3. Decedent's Estate—Exemptions to Widow—Nature of—Rights of Decedent's Children.—Personal property set apart to the widow of a decedent under Sec. 2361 of the Code of 1860, is not hers absolutely, but is to remain with her and is subject to her use: Although it is not held that she may not dispose of fattened hogs, or otherwise prevent waste, p. 577.

Special cross reference. For cases citing the text, and others on the question, see annotations under Gaskell v. Case (18 Iowa 147), Vol. II, p. 600.

Cross reference. See further in this connection, Sec. 3312 of the Code of 1897.

LIDDLE v. KEOUK, MT. PLEASANT & M. R. R. Co., 23 IOWA 378

1. Railroads—Liability for Killing or Injuring Stock—Lessee of Railroad.—The lessee of a railroad in possession of and operating it, is not liable under Chap. 169, Sec. 6, Acts of 1862, for killing or injuring stock on the unfenced right of way thereof; but in such case the lessor, railroad company, is so liable although such lessee may be liable independent of statute for his own negligence, or that of his employees causing the killing or injuring, pp. 379, 380.

Overruled in Stewart v. Ch. & N. W. R. R. Co., 27 Iowa 284, 285, holding that Chap. 79, Acts of 1868, abrogates the rule, and makes a lessee operating or running a railroad liable for killing or injuring stock in the same manner as the lessor company: But that even before the passage of the last named Act, the rule did not apply to a lessee of a railroad having an exclusive right to run, operate and control the road for a period of years.

Special cross reference. For further cases citing the text, and many others on the question, see annotations under Rule 2 of Alger v. M. & M. R. R. Co. (10 Iowa 268), Vol. I, p. 680.

Cross reference. See further on this subject, annotations under Russell v. Hanley (20 Iowa 219), Vol. II, p. 804.

SEARS v. MUNSON, 23 IOWA 380

1. Partnership—Compensation of Member for His Services—When Allowed.—When one partner comes to Iowa and takes charge and management of the partnership business, at the instance of another who remains away attending to his private interests, the former is entitled to a reasonable compensation for his services.

Where a partner is entitled to pay for his services, and there is no agreement as to the amount thereof, the law will fix the amount at what is reasonable, p. 389.

Special cross reference. For cases citing, sustaining and explaining the text, and others, see annotations under Rule 2 of Levi v. Karrick (13 Iowa 344), Vol. II, p. 160.

2. Real Estate—Notice to Purchaser Arising from Possession.—Actual possession of real estate by a person other than the vendor thereof, charges a purchaser from the latter with notice of the rights and title of the former, p. 390.

Reaffirmed in Benbow v. Boyer, 89 Iowa 498, 56 N. W. 545.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others on the question, see annotations under Dickey v. Lyon (19 Iowa 544), Vol. II, p. 763.

OCHELTREE v. CARL, 23 IOWA 394

1. Appeal—Instructions—Harmless Error—Affirmance.—Error of the trial court in giving instructions will not be ground for reversal, when under the evidence or with the other instructions, the erroneous ones could have worked no injury or prejudice to the party, appealing and complaining, p. 396.

Reaffirmed and explained in First Nat'l Bank of Ft. Dodge v. Breese, Whitlock & Co., 39 Iowa 645, holding that the giving of an erroneous instruction which, under the testimony, could work no prejudice to the party complaining will not be regarded as reversible error.

Reaffirmed and qualified in Case v. Ill. Cent. R. R. Co., 38 Iowa 582, 583, holding that an instruction on a material point in a case which is given by the trial court when there is no evidence on which to base it, is reversible error.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

WOLF v. VAN METRE, 23 IOWA 397

(Other Appeals, 19 Iowa 134; 27 Iowa 341.)

1. Husband and Wife—Mortgage by Wife of Her Realty to Secure Husband's Debt—Liability of Wife.—Where a wife mortgages her real estate to secure the debt of her husband, she is not personally liable thereon, and the mortgagee must, as affecting her liability, look alone to the property mortgaged for the satisfaction of his debt, p. 403.

Reaffirmed in Knox v. Moser, 69 Iowa 343, 28 N. W. 630.

Reaffirmed and extended in Low Bros. & Co. v. Anderson, 41 Iowa 478, holding further that a married woman may mortgage her separate estate or property to secure the debt of another; and that an extension of the time of payment of the latter's debt is a sufficient consideration therefor.

Reaffirmed and qualified in Rock v. Kreig, 39 Iowa 241, holding that where a wife mortgages her property to secure a debt for money borrowed by her husband, she does not thereby become the owner of property purchased with the borrowed money; in the absence of proof that the husband was acting for her in the transaction.

Special cross reference. For further cases citing and explaining the text, and many others in this connection, see annotations under Rule 2 of Jones v. Crosthwaite (17 Iowa 393), Vol. II, p. 546.

2. Husband and Wife—Wife's Mortgage to Secure Husband's Debt—Effect of Her Suffering Personal Judgment on Secured Note.—Where a wife becomes surety on a note of her husband, executes a mortgage to secure it on her separate real estate, and suffers

personal judgment to be rendered against her on the note, such judgment is, as between the parties, conclusive, and the wife cannot thereafter avoid it on the ground of coverture, p. 404.

Reaffirmed and explained in Van Metre v. Wolf, 27 Iowa 345, holding that where a married woman suffers default judgment to be entered against her in an action on a note on which she is surety for her husband, she cannot thereafter avoid such judgment on the ground of coverture: Holding, also, that a judgment against the married woman in such case, is conclusive as to the binding force of the contract, and of the rights of the creditor to enforce it against her separate property: That a judgment at law against a married woman upon a contract which she was legally empowered to make, is enforceable as other personal judgments at law.

Reaffirmed and explained in Guthrie v. Howard, 32 Iowa 55, 56, holding that the fact of coverture will constitute no defense to a judgment fairly obtained, upon personal notice against a married woman.

Cross reference. See other rules hereof and cross references there found.

3. Husband and Wife—Mortgage of Wife to Secure Husband's Debt—Effect of Wife Suffering Judgment on Secured Note—Prior Grantees of Other Realty Under Voluntary Deed From Wife, Rights of.—Where a wife becomes surety on a note of her husband and mortgages certain land belonging to her to secure the note, she is not personally liable thereon; and such mortgagee cannot complain of a subsequent voluntary conveyance by her of other land not included in the mortgage, although such conveyance was made after the wife suffers personal judgment to be rendered against her on the secured note, pp. 403, 404.

Cited in Delashmut v. Drau, 44 Iowa 615, the court holding that in order to make a voluntary conveyance void as against creditors, it is indispensable that it should convey property which would be liable to be taken in execution for the payment of debts.

Cited in Hurley v. Osler, 44 Iowa 646, 647, the court holding that where a conveyance of land has been made to defraud creditors, a subsequent purchaser in good faith and for a valuable consideration, but with notice of the fraud, from the fraudulent grantor, may rely on the fraud to protect his title and possession, when sued in equity by the fraudulent grantee.

VANCE v. DIST. TOWNSHIP OF WILTON, 23 IOWA 408

1. District School Board—Power to Change Site of School House—Appeal to Superintendent.—The power given by statute to a district school board to fix the site of a school house carries with it the power to change such site; and, under Sec. 2133 of the Code of

1860, all unwise or inexpedient action of the board, whether of law or of fact, when done within its powers, must find its correction by an appeal to the county superintendent, p. 410.

Reaffirmed in Atkinson v. Hutchinson, 68 Iowa 162, 163, 26 N. W. 55; Carpenter v. Indep. Sch. Dist. No. 5, 95 Iowa 302, 63 N. W. 709, under Sec. 1724 and 1829 of the Code of 1873.

Reaffirmed in James v. Gettinger, 123 Iowa 200, 98 N. W. 724, under Secs. 2773 and 2818 of the Code of 1897.

Reaffirmed and explained in Newby v. Free, 72 Iowa 381, 382, 34 N. W. 170, holding that (under Secs. 1724 and 1829-1835 of the Code of 1873) the decisions of the board of directors and of the county superintendent upon questions relating to the conduct of and of the location of schools, are final and conclusive.

Reaffirmed and extended in Carpenter v. Indep. Sch. Dist. No. 5 of Columbia Township of Tama County, 95 Iowa 301, 302, 63 N. W. 709, holding further that when an appeal is prosecuted to the superintendent of public instruction from the action of the district school board in changing the site of a school house, the decision of the superintendent is final, under Sec. 1835 of the Code of 1873.

Reaffirmed and extended in part in Indep. Sch. Dist. of Lowell v. Indep. Sch. Dist. of Duser, 45 Iowa 394, holding further that, under Sec. 1873 of the Code of 1873, appeals may be taken from the action of the district board of school directors to the county superintendent in all cases involving either law or fact.

McINERNY v. REED, 23 IOWA 410

I. Municipal Corporations—Taxation—Power to Collect Taxes by Sale—When Not Allowed—Action to Enforce Lien for Taxes.—A statute, or charter, granting to a city the power to "levy and collect," does not authorize it to levy upon and sell real estate therefor.

But where such law or charter grants a lien upon real estate for the payment of such taxes, the city may proceed in equity to enforce such lien, pp. 413, 414.

Reaffirmed and varied in Shearer, Treasurer, v. Citizens' Bank of Washington County, 129 Iowa 567, 105 N. W. 1026, holding that but for Sec. 1374 of the Code of 1873, and Sec. 1407a of Code Supplement of 1902, the county would have no action at law to recover taxes on property omitted from taxation; the case, however, turning upon when limitation commences to run under the above sections.

Cited in Warren v. Henly, 31 Iowa 44, upholding as constitutional, an Act allowing a city to levy a special tax for paving and repairing pavements, and authorizing a sale of abutting lots therefor.

Cited in City of Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 71, the

court declining to decide that a power given to a city to sell personal and real property for taxes precludes an action to recover them.

Distinguished in Boynton v. Dist. Township of Newton, 34 Iowa 514-516, holding that the drawing of an order by the president of a school district for its debt, does not discharge it; and if the officers thereof refuse to pay it, they may be compelled by mandamus to levy a tax for its satisfaction.

Distinguished in Crawford County v. Laub, 110 Iowa 356, 357, 81 N. W. 590, holding that the remedies and manner of proceeding to collect the tax under Chap. 62, Acts of Twenty-fifth General Assembly, known as the "mulct law," are exclusive, and precludes an action in equity therefor, or to enforce the lien therein allowed.

Special cross reference. For further cases citing and sustaining the text, and others on the question, see annotations under Ham v. Miller (20 Iowa 450), Vol. II, p. 843.

2. Municipal Corporations—Taxation—Right to Collect Not Assignable.—The power granted to a city to collect taxes cannot be delegated to another, by an assignment by the city of the taxes or tax list to him, pp. 415, 416.

Reaffirmed and extended in Brown v. Sheldon State Bank, 139 Iowa 96, 117 N. W. 294, holding further that where a county treasurer pays taxes to the county which were not in fact collected by him, such payment does not subrogate him to the rights of the county, nor allow him to enforce the tax lien therefor.

Distinguished in Manning v. Mathews, 70 Iowa 505, 30 N. W. 750, holding that a tax voted in aid of a railroad may be assigned by the company after it has been collected and is in the hands of the county treasurer.

NEGUS v. YANCEY & SMITH, 23 IOWA 417

1. Tax Sale of Land—Failure of Clerk to Note on Tax Sales Book—Rights of Tax Sale Purchaser—Subsequent Purchaser of Land Under Execution Sale.—Where the clerk fails to note a tax sale of land on the tax sales book, this does not affect the right or title of the tax sale purchaser, as against a subsequent purchaser of the land under an execution against the former owner, where the tax sale purchaser received a tax deed and had it recorded before the execution sale. Such failure of the clerk would only affect the rights or title of the tax sale purchaser, as against subsequent purchasers, or mortgagees without either actual or constructive notice of the prior tax sale, p. 418.

Cited in Phelps v. Meade, 41 Iowa 475, 476, the court holding that an error or irregularity in the manner of a sale of land for taxes and an error in the tax deed, as to the day the sale was made does not affect the validity of the tax title: That a tax deed of land made more than three years after the tax sale is valid.

Cited in McCready v. Sexton & Son, 29 Iowa 407 (dissenting opinion), 4 Am. Rep. 214, not in point.

DAVIS v. KEITH, 23 IOWA 419

1. **Res Adjudicata—Actions—Defendant Properly Served Concluded by Orders and Judgments in.**—Where the court has jurisdiction of the subject-matter, a defendant who is served with notice of the pendency of the action against him, is charged with notice of everything contained in the petition, and is concluded by a decree therein which is consistent therewith, pp. 420, 421.

Reaffirmed and varied in Finch v. Hollinger, 47 Iowa 176, holding that where a court has jurisdiction of the parties and of the subject-matter, an erroneous order or judgment is valid, until reversed or set aside.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

PIERCE v. WALKER, 23 IOWA 424

1. **Appeal—Verdict Against Evidence as Ground for Reversal—Evidence Conflicting.**—The Supreme Court will not reverse a judgment in an action at law because the verdict was against the evidence, when the trial court refused to grant the new trial, and the evidence adduced below was conflicting, and it does not appear from the record that the verdict was clearly against the evidence, or there are other circumstances strongly indicating that injustice was done appellant, p. 426.

Reaffirmed in Hubbell & Bro. v. Ream, 31 Iowa 296.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Special cross reference. For further cases citing and explaining the text, see annotations under Ackley v. Berkey (22 Iowa 226), ante. p. 22.

2. **Evidence—Written Contracts—Parol Evidence Inadmissible to Vary.**—Parol evidence is inadmissible to add new terms or conditions to a written contract, p. 428.

Distinguished in Johnson v. Tantlinger, 31 Iowa 502, holding that in an action by the grantee of land against the grantor for conversion by the latter of crops growing on the land at the time of the conveyance, the defendant (grantor) may plead and prove, at least in mitigation of plaintiff's (grantee's) claim, that the specific crops were the produce of his labor, whereby they were brought from an immature to a mature condition, and that this labor was done with the plaintiff's knowledge and consent—The court declining to decide whether growing crops will pass as realty under a deed to land.

(Note.—In this present case neither fraud, accident or mistake was pleaded.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of Warren v. Crew (22 Iowa 315), ante. p. 36.

3. United States Mail—Contract to Carry—Sub-letting, When Valid.—A party may enter into a contract whereby another agrees to perform his contract with the post office department; and the fact that the last contract was not consented to by the department will not render it void as between the parties to it; but in this latter case the original mail contractor and his sureties are liable to the Government for default in the performance of the contract, and the parties to the second contract will have to settle the question of damages for violation thereof, between themselves, p. 429.

Reaffirmed in Gordon v. Dalby, 30 Iowa 227-229.

STATE v. ARTHUR, 23 IOWA 430

1. Trial—Instructions Not Based on Evidence are Reversible Error.—An instruction given upon the trial of an indictment and which has no evidence on which it is based, is reversible error, p. 431.

Reaffirmed in Byington v. McCadden, 34 Iowa 218; Case v. Ill. Cent. R. R. Co., 38 Iowa 582, 583; State v. Thompson, 45 Iowa 415; Hess v. Wilcox, 58 Iowa 384, 10 N. W. 848, applying the rule in both civil and criminal cases.

Reaffirmed and qualified in State v. Thompson, 45 Iowa 415, holding that while an instruction embodying an abstract proposition of law, which is correct but not applicable to the evidence, may not alone be reversible error, yet where all the instructions embody only such abstract propositions, it will be so treated upon appeal, and the judgment will be reversed.

2. Criminal Law—Evidence—Escape of Prisoner, for What Admissible—Instruction as to.—An unexplained escape is admissible in evidence as a circumstance against a person accused of a crime; but it only raises a presumption of guilt, inconclusive rather than strong, and dependent for its force upon the circumstances of each case.

The fact of a prisoner evading or attempting to evade justice is *prima facie* indicative of guilt; and an instruction on this question must go no further than this, p. 432.

Reaffirmed in State v. Matheson, 130 Iowa 452, 103 N. W. 141, 114 Am. St. Rep. 427.

Reaffirmed and explained in State v. Seymour, 94 Iowa 710, 63 N. W. 665, holding that upon the trial of an indictment for murder, it is not error for the court to give to the jury an instruction, which is based upon evidence, that "if you find from the evidence that the defendant, upon being informed that he was suspected of taking the life of deceased fled to avoid arrest, and remained away, going under an assumed name, such fact is a circumstance which, *prima facie*, is indicative of guilt."

Reaffirmed and explained in State v. Wrand, 108 Iowa 76, 78 N. W. 789, holding that an attempt of an accused person to escape is a circumstance proper to be shown and considered by the jury.

Reaffirmed and explained in State v. Poe, 123 Iowa 129, (cited in dissenting opinion, 134), 98 N. W. 591, 593, 101 Am. St. Rep. 307, holding that although the fact that one accused of crime fled to avoid arrest may be *prima facie* indicative of guilt, still, an instruction upon the trial of such accused person that "such fact would be presumptive evidence of guilt," is reversible error—The court saying that "although the term 'presumptive evidence of guilt,' as applied to a certain state of facts may, perhaps, sometimes indicate no more than that the facts referred to may be considered by the jury as evidence from which guilt may be inferred as a matter of fact, and not as a matter of law, yet it is always unwise, in giving the jury instructions as to the evidence, to say that from any particular fact a presumption of guilt arises."

(Note.—See further sustaining and explaining, but not citing the text, State v. Boyer, 79 Iowa 330, 44 N. W. 558; State v. Schaffer, 70 Iowa 371, 30 N. W. 639; State v. Stevens, 67 Iowa 558, 25 N. W. 777; State v. Fitzgerald, 63 Iowa 268, 19 N. W. 202; State v. Rodman, 62 Iowa 456, 17 N. W. 663; State v. Ruby, 61 Iowa 86, 15 N. W. 848; State v. James, 45 Iowa 412.—Ed.)

COLE v. COLE, 23 IOWA 433

I. Divorce—Inhuman Treatment by Husband Endangering Life of Wife—What Sufficient—Denial of Medical Aid and Attention to Sick Wife.—For a husband to deny medical aid and other treatment and attention to his sick wife constitutes a ground for divorce, under the statute (Code of 1860) allowing it to a wife on account of cruel and inhuman treatment of her husband such as would endanger her life. That which would be inhuman treatment such as would endanger such a wife's life, might fall far below the statutory cruelty to a wife in good health and of vigorous constitution, pp. 437, 438.

Reaffirmed and explained in Aitchison v. Aitchison, 99 Iowa 107, 68 N. W. 578, holding that treatment by the husband which is calculated to affect the mind of his wife so as to destroy her health and ultimately endanger her life, or which involves by natural consequences, a permanently injurious and prejudicial effect upon her health, perilous to life, is sufficient to constitute a ground for divorce.

Reaffirmed and varied in Craig v. Craig, 129 Iowa 193-195, 105 N. W. 447, 2 L. R. A. (New Series) 669, holding that where a husband so deports himself with another woman as to show himself a violator of the marriage vows, neglects his wife for her, and declares his love for the other woman to his wife, such conduct constitutes

such inhuman treatment as will endanger the wife's life, and entitles her to a divorce, under the Code of 1897.

Special cross reference. For further cases citing the text, and many others on the question, see annotations under *Beebee v. Beebee* (10 Iowa 133), Vol. I, p. 659.

Cross reference. See further Sec. 3174 of the Code of 1897.

2. Divorce—Alimony—Property Rights of Parties to be Settled Upon Decree of Divorce.—Upon a decree of divorce the question of alimony to the wife, and the property rights of the parties is, under Sec. 2537 of the Code of 1860, to be adjudged by the court, with a due regard to the rights of both, each case to be determined upon its own facts and circumstances. The court may set apart a certain portion of the husband's real estate to the wife as alimony, when he deems this just and equitable, pp. 445, 446.

Reaffirmed in part in *Twing v. O'Meara*, 59 Iowa 331, 13 N. W. 323, holding that in an action by a wife for divorce and alimony it is competent for the court to set apart to the plaintiff, a specific portion of the defendant's real estate as alimony.

Cited in *Zuver v. Zuver*, 36 Iowa 197, the case reviewing previous cases in this state on the subject of alimony.

3. Divorce Action—How Tried—Appeal—Weight Given to Verdict.—An action for divorce is to be tried according to the second method prescribed by Secs. 2999 and 3000 of the Code of 1860; and the verdict of a jury in such case will be given the same weight upon appeal as if returned in a purely law action, p. 439.

Reaffirmed and extended in *Lynch v. Lynch*, 28 Iowa 326, 327, holding that in all cases where an equitable action is tried by the second method prescribed by the sections of the text, whether so tried as thereby required, or by agreement of the parties, appeals will be tried only on legal errors as other ordinary actions.

Reaffirmed and extended in *Zuver v. Zuver*, 36 Iowa 195, 196, holding further that the finding of facts of a referee in an action for divorce will be treated upon appeal as a verdict of a jury in an action at law.

Reaffirmed and extended in *Harmon v. Harmon*, 38 Iowa 691, (abstract), holding further that a verdict of a jury in an action for divorce will be treated as if returned in an action at law; and the judgment will not be reversed because the verdict was against the evidence, unless it is clearly unsupported thereby.

Cited in *Knight v. Knight*, 31 Iowa 452, a case wherein the Supreme Court reviewed a divorce action upon its merits, waiving and not deciding upon the rule of the text.

Cross reference. See further on this question, Sec. 3652 of the Code of 1897, which seems to change law on this subject.

4. Trial—Instructions to be Based on Facts—When Proper.—

Upon the trial of an action by jury, if there is any evidence fairly tending to establish any proposition, it is proper to give to the jury the law in relation to it, p. 442.

Reaffirmed and extended in Potter v. C. R. I. & P. R. R. Co., 46 Iowa 402, holding further that where the charge of the trial court states the issues, it must do so fully, and must give the jury such instructions in reference to all issues supported by any evidence as will enable them to apply the evidence to the principles of law given.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

5. Divorce—Custody of Children—Welfare and Future of, the Guide.—In determining the right to the custody of children in an action for divorce, the court will consult and look to the welfare and future well-being of the mutual off-spring of the parties; and will determine such question in each case as is right and proper, according to the facts and circumstances, pp. 446, 447.

Reaffirmed in Caldwell v. Caldwell, 141 Iowa 195, 119 N. W. 601.

CARPENTER v. PARKER, 23 IOWA 450

1. Appeal—Instructions or Charge to Jury Excepted to Generally Below—Review.—General exceptions to the charge of the court or instructions given to the jury will not authorize a review upon appeal of specific errors therein, when any part or one is correct, p. 452.

Reaffirmed in Mershon v. Nat'l Ins. Co., 34 Iowa 88.

Cited in Miller v. Gardner, 49 Iowa 236, a case turning on the fact that a motion for a new trial—under the Code of 1873—did not definitely specify the grounds of objections to instructions given to the jury.

Cross reference. See further on this question, annotations under Rule 5 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), Vol. II, p. 140.

CRAWFORD v. NEWELL, 23 IOWA 453

1. Attachment—Levy of on Personal Property—What Sufficient for.—To constitute a valid levy of an attachment on personal property under Sec. 3194 of the Code of 1860, the officer should do that which would amount to a change of possession, or something that would be equivalent to a claim of dominion coupled with a power to exercise it, p. 456

Reaffirmed in Nockles v. Eggspieler, 47 Iowa 401, 402, under Sec. 2967 of the Code of 1873.

Reaffirmed and explained in Bickler, Winzer & Co. v. Kendall, 66 Iowa 706, 707, 24 N. W. 519, holding that the fact that sheriff in

attempting to levy an attachment upon goods within a building, barricades the front door thereof, does not, under Sec. 2967 of the Code of 1873, constitute such a taking of possession of the property or the exercising dominion thereover as is sufficient for a valid levy of the writ, as against a third person in possession of and claiming the goods at the time of the attempted levy.

Reaffirmed, explained and extended in Allen v. McCalla, 25 Iowa 487, 96 Am. Dec. 56; Hibbard, Spencer, Bartlett & Co. v. Zenor, 75 Iowa 476, 477, 39 N. W. 717, 9 Am. St. Rep. 497; Peppers v. Harris, 145 Iowa 637, 124 N. W. 625, holding that in order to make a legal and valid levy, the officer must do such acts as that, but for the protection of the writ, he would be liable in trespass therefor: And that anything short of this will not confer upon the officer a right of property or possession; and certainly not as against a third party.

Reaffirmed and extended in Citizens' Nat'l Bank of Des Moines v. Converse, 101 Iowa 309-311, 70 N. W. 201, holding that the taking possession of personal property by the officer under an attachment, is notice of the levy thereof to third persons, and that the giving of notice to the defendant as required by Sec. 2967 of the Code of 1873, is for his benefit alone, and third persons cannot complain of the failure to give the notice.

Reaffirmed and qualified in Cedar Rapids Pump Co. v. Miller & Sons, 105 Iowa 676, 75 N. W. 504, 67 Am. St. Rep. 322, holding that the levy upon books of account either under attachment or execution, does not reach or subject the debts therein; but they must be reached by garnishment.

Cited in First Nat'l Bank of Newton v. Jasper County Bank, 71 Iowa 488, 32 N. W. 401, holding that Sec. 2967 of the Code of 1873 applies to levies upon all property subject to levy; that the return of the officer upon the execution of an attachment is constructive notice to all persons of the levy. But that where an officer in attempting to levy an attachment on land, fails to give notice to the defendant and persons in possession, and fails to make return of the writ prior to an execution and filing for record of a mortgage on the land by the defendant (debtor) to an innocent third person, the rights of the latter are superior; even though the sheriff make entry of the levy in the incumbrance book before the execution and filing for record thereof.

Distinguished in Klotz v. James, 96 Iowa 3, 4, 64 N. W. 649, 59 Am. St. Rep. 348, holding that the fact of the validity of the levy of an attachment can only be questioned by one who is the owner of the property; and such claim is unavailable to a vendee in a fraudulent sale thereof.

SNOWDEN *v.* SNOWDEN, 23 IOWA 457

1. Appeal—Equitable Action Tried Below by Second Method—Review.—Upon an appeal in an equitable action tried below according to the second method prescribed by Secs. 2999 and 3000 of the Code of 1860, the Supreme Court will review the cause as appeals in actions at law; and in such case the decision of the lower court upon the evidence will be treated upon the appeal as the verdict of a jury, p. 457.

Reaffirmed in Mallory *v.* Luscombe, 31 Iowa 270; Jones *v.* Clark, 37 Iowa 592.

Reaffirmed in Lynch *v.* Lynch, 28 Iowa 326, 327, holding that in all cases where an equitable action is tried by the second method prescribed by the sections of the text, whether so tried as thereby required or by agreement of the parties, appeals will be tried only upon legal errors as other ordinary actions.

Reaffirmed in Schmeltz *v.* Schmeltz, 52 Iowa 513, 3 N. W. 537, under the Code of 1873.

Cited in Dove *v.* Indep. Sch. Dist. of Keokuk, 41 Iowa 692, holding that a proceeding by mandamus is a law action, and will be so treated upon appeal; and that the decision of the lower court therein will thereon be regarded as the verdict of a jury.

Cross reference. See further on this question, Sec. 3652 of the Code of 1897, which seems to change the law on this subject.

STATE *v.* HOLMES, 23 IOWA 458

1. Criminal Law—Bail—Arrest of Accused After Forfeiture—Discharge of Sureties on Bail Bond.—Where, after an order of forfeiture of a bail bond, the court has the accused arrested and then sets aside the order of forfeiture, the subsequent escape, or setting at liberty of the prisoner and his thereafter failing to appear, does not authorize another forfeiture to be entered against the sureties on the bond; but such arrest and setting aside of the forfeiture operates, under Sec. 4995 of the Code of 1860, to discharge the sureties, pp. 460, 461.

Reaffirmed in State *v.* Orsler, 48 Iowa 344, 30 Am. Rep. 398, holding that where an accused person who is on bail is arrested by order of court, and thereafter is released from custody by the court's order, such facts and conduct of the court discharges the sureties on the bail bond, and they cannot afterward be held liable thereon, without their subsequent consent.

KIDD *v.* WILSON, 23 IOWA 464

1. Mechanic's or Materialman's Lien—Failure to File Account and Statement Within Ninety Days—Validity of Lien as Against Land Owner—Innocent Third Persons.—The failure of a mechanic

or materialman to file his account and statement of labor done or materials furnished within ninety days as required by statute does not affect the lien, as against the land owner, but will only affect it as to third persons without notice.

It follows that the filing of a defective account or statement does not affect the lien, as against the land owner, p. 466.

Reaffirmed in Neilson, Benton & O'Donnel v. Iowa Eastern R. Co., 51 Iowa 187, 1 N. W. 437, 33 Am. Rep. 124; Bissel v. Lewis, 56 Iowa 240, 9 N. W. 181.

Reaffirmed and explained in Nat'l Lumber Co. v. Bowman, 77 Iowa 709, 42 N. W. 558, holding that the fact that a statement for a mechanic's or materialman's lien misdescribes the property on which it is claimed, is immaterial as to one dealing with and concerning the premises with actual knowledge of the lien thereon.

Reaffirmed and extended in Ch. Lumber Co. v. Des Moines Driving Park, 97 Iowa 34, 35, 65 N. W. 1020, holding further that a mechanic's or materialman's lien is good, even though no statement is filed within ninety days, as against incumbrances, unless their rights accrued after the ninety days and before any claim for a lien was filed, and without actual notice.

Cited in Bissel v. Lewis, 56 Iowa 236, 9 N. W. 179, the court holding that the taking of a note of the land owner without other security by the mechanic or materialman, does not affect the lien.

Cross references. See further on this question, annotations and cross references under Rule 2 of Jones v. Swan (21 Iowa 181); Noel v. Temple (12 Iowa 276), Vol. II, pp. 890, and 47, respectively.

2. Mechanic's or Materialman's Lien—Contract with Agent of Land Owner.—A contract by the mechanic or materialman with the agent of the land owner for the performance of the labor or the furnishing of materials, is sufficient on which to base the lien therefor; and a husband may make such contract when he acts as the agent of his wife who owns the land, pp. 466, 467.

Reaffirmed in Burdick v. Moon, 24 Iowa 419.

Cross reference. See further on this question, annotations under Rule 1 of Jones v. Swan (21 Iowa 181), Vol. II, p. 890.

RELIEF V. EBERLY, 23 IOWA 467

1. Limitation of Actions—Relief on Ground of Fraud—Rule at Law and in Equity.—Under Secs. 2740 and 2741 of the Code of 1860, an action in equity for relief on the ground of fraud, where the action was before the adoption of that code solely cognizable in a court of chancery, is not barred until five years after the discovery of the fraud.

But the rule is different where such an action may be maintained and the same relief may be granted either at law or in equity; and in

such case the action is barred, if not commenced within five years after the fraud is perpetrated, pp. 469, 470, 472.

Reaffirmed as to first paragraph in Phoenix Ins. Co. v. Dankwardt, 47 Iowa 434, under Sec. 2530 of the Code of 1873, corresponding to Sec. 4741 of the Code of 1860.

Reaffirmed as to second paragraph in McGinnis v. Hunt, 47 Iowa 669, 670; Daugherty v. Daugherty, 116 Iowa 247, 248, 90 N. W. 66.

Reaffirmed and varied in Garst v. Brutsche, 129 Iowa 503, 105 N. W. 453, holding that an action in equity to correct a mistake in a written instrument is barred, under Secs. 3447 and 3448 of the Code of 1897, unless commenced by plaintiff within five years after the discovery of the mistake.

Cited in Williams v. Allison, 33 Iowa 285; Dist. Township of Spencer v. Dist. Township of Riverton, 62 Iowa 31, 17 N. W. 105; Bacon v. Chase, 83 Iowa 530, 50 N. W. 26; S. C. & St. P. Ry. Co., v. O'Brien County et al, 118 Iowa 583, 92 N. W. 858, the court holding—as does the present case in argument—that our statute of limitations applies equally to suits in equity as in actions at law.

Distinguished and narrowed in Carrier v. Ch. R. I. & P. Ry. Co., 79 Iowa 88-90, 44 N. W. 206, 6 L. R. A. 799, holding that where the right of action is fraudulently concealed from the person entitled thereto by the person against whom it lies, the statute of limitation commences to run thereon from the time of the discovery of the fraud and the right of action by the person entitled to maintain it.

And see 146 Iowa 88, 123 N. W. 757; 146 Iowa 450, 124 N. W. 875.

STEWART v. BRAND, 23 IOWA 477

1. Husband and Wife—Defective Description of Property in Deed of Husband to Wife—Correction in Equity by Wife's Devises.—Where a deed of a husband to his wife, which is made in good faith and without fraud, defectively or incorrectly describes the realty conveyed, equity will correct it in favor of a devisee of the wife, and against the husband, grantor, p. 481.

Distinguished in Else v. Kennedy, 67 Iowa 380, 381, 25 N. W. 292, holding that equity will not assist the grantee in an imperfect conveyance and which is not supported by either a valuable or meritorious consideration against either the grantor or his representatives: Hence, holding that where a mother executes a voluntary conveyance to one of her children, which so imperfectly describes the realty as to make the instrument void for uncertainty, equity will not reform the deed and correct the description in favor of the grantee, child, as against the other children and heirs of the grantor.

2. Descent and Distribution—Homestead Descends to Heirs or Devises Subject to Right of Occupancy by Surviving Consort.—Upon the death of a husband or wife who has the title to the home-

stead, it descends to the decedent's heirs or devisees, subject to the right of the surviving consort to continue to use and occupy it as a homestead, p. 481.

Reaffirmed in Johnson v. Gaylord, 41 Iowa 366.

Reaffirmed and explained in Reilly v. Reilly, 135 Iowa 442, 443, 110 N. W. 446, holding that the right of the wife to continue in possession and occupancy of the homestead after the death of her husband, is not a right or interest in his estate which she takes by inheritance, but is entirely distinct from the interests which she takes by virtue of that right: That it is a mere personal right to occupy and possess the premises, but is unaccompanied by any title or property interest therein.

Cross reference. See further on this question, annotations under Meyer v. Meyer (23 Iowa 359), ante. p. 110.

3. Homestead—Abandonment—Temporary Lease Is Not.—A temporary lease or rental of homestead is not an abandonment thereof, p. 482.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Rule 1 of Fyffe v. Beers, (18 Iowa 4), Vol. II, p. 573.

PRESSER v. HILDENBRAND, 23 IOWA 483

1. Vendor and Purchaser—Contracts for Sale and Conveyance of Land—Vendor Unable to Perform Cannot Forfeit for Failure to Pay Price.—Where under a contract to convey land the vendor is unable to comply with the contract, as for the failure of his wife to join in the deed, he cannot treat the contract as forfeited because the purchaser refuses to pay the whole of the purchase price, p. 491.

Unreported citation, 132 N. W. 65.

2. Vendor and Purchaser—Title Bond by Husband—Wife Refusing to Join in Deed—Rights and Remedies of Purchaser.—When the wife of the vendor refuses to join with her husband in the execution of a sufficient deed to enable him to perform on his part, a contract for the conveyance of real estate, the vendee has the option of accepting performance by the husband, to the extent of his ability, and the retention of so much of the purchase money as shall be proportionate to the highest outstanding or contingent interest not conveyed, without paying interest on it, or to refuse such partial title, and have his damages for breach of the covenant, etc., p. 492.

Reaffirmed and extended in Wetherell v. Brobst, 23 Iowa 589, 590; Ormsby v. Graham, 123 Iowa 210, 98 N. W. 724, holding further that he who, having some interest in or defective title to land, agrees to convey a good title, cannot escape his liability in an action for specific performance, provided the purchaser elects to accept such title as the vendor's deed will convey: The last case holding further that

such a waiver of full performance has the effect to make the remedy mutual, and partial performance will be enforced, with assessment of damages or abatement from the contract price by reason of the failure to perform in full; but that the rule does not apply where the vendor has not some apparent right or interest in the property, or where the vendee enters into the contract knowing that the vendor has not the title which he agrees to convey.

And see 151 Iowa 586, not yet published.

Special cross reference. For further cases citing, sustaining, explaining and extending the text, and others on the question, see annotations under *Leach v. Forney* (21 Iowa 271), Vol. II, p. 904.

KOONS *v.* CHICAGO & NORTHWESTERN RY. CO., 23 IOWA 493

1. Railroad Companies—Liability for Killing or Injuring Stock—Limitation of Action.—An action, under Sec. 6, Chap. 169, Acts of 1862, against a railroad company for double damages for killing or injuring stock, is an action for injury to property, and not a penalty, and is barred under the Code of 1860, unless commenced within five years after the killing or injury, pp. 495, 496.

Reaffirmed in *Mackie v. Cent. R. R. Co.*, of Iowa, 54 Iowa 542, 6 N. W. 724.

Reaffirmed and explained in *Manwell v. B. C. R. & N. Ry. Co.*, 80 Iowa 667, 45 N. W. 570, holding that one whose stock is injured by a railroad company at a place where it has a right to but does not fence, is entitled to recover only for the actual value of his time and the money expended in healing or curing the animals; but may recover double damages for their injury, upon compliance with Sec. 1289 of the Code of 1873.

Cited in *Wall, Adm'r v. Ch. & N. W. Ry. Co.*, 69 Iowa 502, 29 N. W. 428, the court holding that a foreign railroad company may plead the statute of limitation.

Cited in *Winney v. Sandwich Mfg. Co.*, 86 Iowa 513, 53 N. W. 423, 18 L. R. A. 524, the court holding that a foreign corporation that has no agent in this state on whom process can be served cannot plead the statute of limitation of this state, in an action against it herein.

Distinguished in *Herriman v. B. C. R. & N. R. R. Co.*, 57 Iowa 189-192, 9 N. W. 378, holding that an action against a railroad company to recover the penalty or damages for its charging more than its maximum rate for the transportation of freight is allowed by Chap. 68, Acts of the Fifteenth General Assembly, is an action for a penalty, and is barred under Sec. 2529 of the Code of 1873, unless commenced within two years after the cause of action accrued—And to the same effect is *Baker Wire Co. v. Ch. & N. W. Ry. Co.*, 106 Iowa 240-242 76 N. W. 665, (citing the text), involving an action under Chap. 28, Acts Twenty-second General Assembly, against a railroad company to recover treble damages for overcharge in freight rates.

REED v. KING, 23 IOWA 500

1. Husband and Wife—Mortgage by Wife to Secure Husband's Debt—Personal Judgment Against Wife is Reversible Error.—In an action to foreclose a mortgage given by a wife to secure her husband's debt, the mortgagee should be limited in the decree, as against the wife, to the value of the mortgaged property; and a general or personal judgment for the debt, in such case, is erroneous, and will be reversed upon appeal, p. 505.

Reaffirmed and qualified in Rock v. Kreig, 39 Iowa 241, holding that where a wife mortgages her property to secure a debt for money borrowed by her husband, she does not thereby become the owner of property purchased with the borrowed money; in the absence of proof that the husband was acting for her in the transaction.

Special cross reference. For further cases citing and sustaining the text, and many others in this connection, see annotations under Rule 2 of Jones v. Crosthwaite (17 Iowa 393), Vol. II, p. 546.

Cross reference. See further on this question, annotations under Wolf v. Van Metre (23 Iowa 397), ante. p. 114.

STATE v. CARPENTER, 23 IOWA 506

1. Assault with Intent to Inflict Great Bodily Harm—Indictment for—Sufficiency of.—An indictment which avers that the accused "did strike and beat C. D. with intent of doing her great bodily injury" sufficiently charges the offense of an assault with intent to inflict great bodily harm as denounced by Sec. 4217 of the Code of 1860, pp. 507, 508.

Cited in State v. Cummings, 128 Iowa 523, 105 N. W. 58, the court holding that an indictment for assault with intent to do great bodily harm is sufficient, when it avers that the accused "did unlawfully, willfully, maliciously, and with specific intent and there to inflict great bodily injury, make an assault upon one L. C., and did then and there, with specific intent to inflict a great bodily injury, strike, beat, bruise and otherwise maltreat the said L. C."

Cited in State v. Mitchell, 139 Iowa 458, 116 N. W. 810, the court holding that an indictment for an assault with intent to do great bodily harm is sufficient if it avers that the accused willfully, maliciously and unlawfully and with such intent, assaulted a designated person with a gun and threatened to shoot him.

2. Justice's Court—Appeal from Justice's to District Court of Prosecution of Which Former Had No Jurisdiction—Effect.—Where a justice's court has no jurisdiction of a criminal prosecution or offense therein charged by information, an appeal thereof to the district court gives the latter no jurisdiction, p. 508.

Reaffirmed in State v. Babcock, 112 Iowa 251, 83 N. W. 909.

BURDICK v. HEIVLY, 23 IOWA 511

1. Lands—Adverse Possession—Limitation of Actions.—In order to constitute adverse possession of land, there must be an actual possession for the statutory period under a claim or color of title, and under which the party claiming the right has in good faith and continuously held as against the owner for such time.

The declarations and acts of the party in possession of land are admissible on the question of adverse possession, and to show the extent of the interest claimed by him, p. 514.

Reaffirmed as to first paragraph in Brown v. Bridges, 31 Iowa 141, 142; Grube v. Wells, 34 Iowa 149-152; Fulmer v. Beck, 105 Iowa 521, 75 N. W. 368; Sires v. Melvin, 135 Iowa 467, 468, 113 N. W. 109.

Cross references. See Rule 2 hereof. See further on this question, annotations under Jones v. Hockman (12 Iowa 101), Vol. II, p. 19.

2. Lands—Adverse Possession—Limitation of Actions—Establishment of Division Fence—Effect.—Where adjoining land owners erect a fence at their mutual cost, it will be taken as the division line, and the possession of the land to such fence by one of the owners, acquiesced in for the statutory period of ten years will bar an action to recover any part thereof, although such fence was, by mistake, not erected on the division line, pp. 514, 515.

Reaffirmed in Faulke v. Stockdale, 40 Iowa 101; Davis v. Curtis, 68 Iowa 69, 70, 25 N. W. 933.

Reaffirmed and explained in Miller v. Mills County, 111 Iowa 660, 661, 82 N. W. 1041, holding that the division line between adjoining tracts, definitely marked by the erection and maintenance of a fence or other monuments recognized by the owners as such, and up to which they have occupied and cultivated the land on either side more than ten years—the statutory period of limitation—is the true boundary between them.

Distinguished in McNamee v. Moreland, 26 Iowa 107, 108, a case wherein the facts do not come up to the rule.

Unreported citation, 96 N. W. 773.

NEPPMAN v. SCHRAMM, 23 IOWA 521

1. Justice's Court—Appeal to District Court From—Amendment of Pleading in Latter.—Upon an appeal from a justice's to the district court, it is not error for the latter court to allow the defendant to file an amended answer setting up an additional reason why he is not liable for plaintiff's claim, p. 525.

Reaffirmed and explained in Griswold v. Bowman, 40 Iowa 369, holding that the filing of amendments on appeal from a justice's to the

district or circuit court, is a matter within the discretion of the latter court; but that the refusal to allow an amendment upon such an appeal is proper, when it sets up a matter over which the justice's court had no jurisdiction.

Cited in *Pride v. Wormwood*, 27 Iowa 262, the court holding that where a party's request to amend is reasonable, and its refusal works manifest injustice, it will be ground for reversal on appeal.

Cited in *Sneddiker v. Poorbaugh*, 29 Iowa 489, not in point, but on the question of the right to amend pleadings in actions commenced and pending in the district court.

Cross reference. See further on this question, annotations under Rule 2 of *Leftwick v. Thornton* (18 Iowa 56), Vol. II, p. 584.

TEUCHER & ENGLISH v. HIATT, 23 IOWA 527, 92 AM. DEC. 440

1. Execution Sale of Land—Redemption from—Computation of Time for.—In computing the time allowed for the redemption of real estate from a sale under execution—under the codes of 1851 and 1860—the day of sale is to be excluded and the whole of the same day of the succeeding year included, p. 530.

Cited in *Ritchey v. Fisher*, 85 Iowa 564, 52 N. W. 506, the court holding that—under Secs. 45 and 3173 of the Code of 1873—appeals may be taken to the Supreme Court in civil actions and special proceedings, within six months from the rendition of the judgment or order appealed from, and not afterward; and that in computing the time allowed therefor, the first day shall be excluded and the last included, unless the last day falls on Sunday, in which case the time prescribed shall include the whole of the next following Monday.

STATE v. KIMBALL, 23 IOWA 531

1. Roads and Highways—Establishment of—Power of Board of Supervisors—Appointment of Commissioners.—Under Sec. 828 of the Code of 1860, the board of supervisors must appoint commissioners for the purposes of the establishment of a public road, on some of its regular days of session, or at some time then fixed therefor, and cannot delegate this power to the district court clerk.

Sec. 328 of the Code of 1860, authorizing the delegation of certain powers to the clerk was not intended to dispense with this requirement; but the board may, under this last section, confer upon the clerk, the power to fix a time when the commissioners shall act, to appoint a day when the matter will be heard or acted upon, or even perhaps, appoint and give notice of the appointment of appraisers upon the filing of a claim for damages, fix the hour of meeting and fill vacancies, pp. 534, 535.

Reaffirmed in *Bennett v. Fisher*, 26 Iowa 499, 501, holding further that the act of 1868, Acts of 1868, p. 40, is constitutional, and

renders valid and cures all irregular proceedings for the establishment of public roads prior to its passage, such as is set out in the text.

Cited in Cooledge v. Mahaska County, 24 Iowa 214, the court holding that the board of supervisors cannot, by virtue of Secs. 327 and 328 of the Code of 1860, delegate its powers in relation to the Poor, to the district court clerk.

Cited in Soward v. Ch. & N. W. R. R. Co., 33 Iowa 389; Iowa R. R. Land Co. v. Soper, 39 Iowa 117; Abney v. Clark, 87 Iowa 730, 55 N. W. 7, not in point.

LIPPENCOTT v. ALLANDER, 23 IOWA 536

(Case Arising Out of Same Facts, 27 Iowa 460, 1 Am. Rep. 299.)

1. Ferry License—Board of Supervisors Granting or Refusing—Appeal Not Allowed.—An appeal does not lie to the district court under Sec. 267 of the Code of 1860, from the decision of the board of supervisors in granting or refusing to grant a ferry license, pp. 537, 538.

Cited in Bankhead v. Brown, 25 Iowa 553, (dissenting opinion), the majority court holding that an appeal lies to the district court from a decision of the board of supervisors in establishing a private road or passway; and that upon such appeal, the constitutionality of the Act under which it was established may be raised and tested.

Distinguished in Lippencott v. Allander, 25 Iowa 446, holding that a party may appeal to the district court from an order of the board of supervisors revoking a ferry license.

YOUNG v. BROADBENT, 23 IOWA 539

1. Attachment—Debt Must Exist to Authorize—Damages for Wrongful Issuance.—In order to authorize the issuance of an attachment, a debt must exist at the time; and if the writ is issued when no debt is due and payable, it is wrongful, and the plaintiff is liable to the defendant for any damages thereby occasioned, p. 543.

Reaffirmed in Harger v. Spofford, 46 Iowa 14; Cawker City Bank v. Jennings, 89 Iowa 233, 234, 56 N. W. 495.

Reaffirmed and narrowed in Smeaton v. Cole, 120 Iowa 371, 372, 94 N. W. 910; Dorr Cattle Co. v. Des Moines Nat'l Bank, 127 Iowa 156, 157, 98 N. W. 920, 4 Am. & Eng. Ann. Cas. 519, holding that the rule is inapplicable where one who attaches has reasonable cause to believe that the defendant is indebted to him, though upon the trial of the attachment action it should be shown otherwise.

Cited in Dickinson & Bartlett v. Athey, 96 Iowa 365, 65 N. W. 327, the court holding that in order to entitle an attachment debtor to attorney's fees by reason of the wrongful suing out of the writ, as allowed by Sec. 2961 of the Code of 1873, he must prove that the at-

tachment was wrongfully sued out, and that there was no reasonable cause for the attachment creditor to believe the ground on which it was issued.

Cited in *Peters v. Snavelly-Ashton*, 144 Iowa 154, 120 N. W. 1051, the court holding that as a general rule in order that there be recovery upon an attachment bond, the defendant in attachment must show, not only that the grounds for the issuance of the writ were in fact untrue, but that the attaching plaintiff had no reasonable grounds to believe them to be true: Holding further that an attachment bond conditioned upon the payment of damages to defendant as individual will not authorize his recovering damages occasioned to him *as trustee*, or personal representative.

Unreported citation, 132 N. W. 430.

2. Pleading—Defects in Waived by Trial.—An objection to a pleading for a defect which is apparent on its face, must be raised by demurrer, is waived by a trial on the merits, and cannot be raised by an instruction to the jury, p. 543.

Reaffirmed in *Kendig v. Overhuizer*, 58 Iowa 196, 12 N. W. 264; *Cruver v. Ch. M. & St. P. Ry. Co.*, 62 Iowa 462, 17 N. W. 662; *Great Western Printing Co. v. Tucker*, 73 Iowa 756, 757, 34 N. W. 206; *Price v. Baldauf*, 82 Iowa, 676, 46 N. W. 986.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

ROBEY & ROBEY *v.* KNOWLTON, 23 IOWA 544

1. Limitation of Actions—Cause of Action on Contract Proved Just by Defendant's Evidence, Not Within Statute—Sufficiency of Proof for.—In order to avoid the statute of limitations in an action on a contract, as provided by Sec. 2742 of the Code of 1860, it must appear affirmatively from the evidence of the defendant *alone* that the cause of action still justly subsists, pp. 545, 546.

Reaffirmed in *Howell v. Patton*, 26 Iowa 537, 538; *Stewart v. McMillan*, 34 Iowa 457.

HUGHES *v.* FEETER, 23 IOWA 547

1. Appeal—Judgment Obtained by Party's Own Motion Cannot Be Appealed by Him.—Where a party upon his own motion obtains a judgment, to which, of course, he does not except he cannot prosecute an appeal therefrom, p. 548.

Reaffirmed and extended in *Stever v. Heald*, 61 Iowa 710, 17 N. W. 146, holding further that a party cannot appeal from a judgment entered by his consent.

2. Execution Sale of Land—Period for Redemption.—The statutory right to redeem property from an execution sale within one year cannot be extended by any act of the party claiming that right, such as a suit to redeem, or the like, without more.

But in this case the judgment of the lower court allowing the execution debtor to redeem after that period is affirmed, on account of the peculiar circumstances and equities in his favor, p. 549.

Reaffirmed and explained in Teabout v. Jaffray & Co., 74 Iowa 30, 31, 36 N. W. 784, 7 Am. St. Rep. 466, holding that while it is true, as a general rule, that a statutory right of redemption can be exercised only within the period and in the manner prescribed by the statute creating it; yet where the party entitled to redeem, who is not the execution debtor, is, at the time of the sale, contesting the right of the execution creditor to sell land, such right of redemption will be extended until the termination of the litigation and the right to sell is determined.

Cited in King v. Tharp, 26 Iowa 287, not in point.

SHAFFER, ADM'R v. GRIMES, 23 IOWA 550

1. Actions—Abatement and Revivor—Actions Ex Delicto—Seduction.—Under the Act of 1862, a substitute for Sec. 3467 of the Code of 1860, an action *ex delicto* does not abate upon the death of either party thereto, but it may be revived in the name of or against the personal representative of decedent, unless from the legal nature of the case it cannot survive. And this rule applies to an action for seduction by an unmarried woman, which does not abate upon the death of a party, but may be so revived, pp. 555, 556, 558.

Special cross reference. For cases citing the text, see annotations under Carson v. McFadden (10 Iowa 91), Vol. I, p. 648.

2. Appeal—Instructions Without Prejudice Are No Grounds for Reversal.—Instructions given by the trial court, though erroneous, when they worked no prejudice and did not affect the verdict are not ground for reversal upon appeal, p. 558.

Reaffirmed in Hunt v. Ch. & N. W. R. R. Co., 26 Iowa 366; First Nat'l Bank of Ft. Dodge v. Breese, Whitlock & Co., 39 Iowa 645.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

NOBLE v. BULLIS, 23 IOWA 559, 92 AM. DEC. 442

1. Tax Sale of Land—Redemption From—Equitable Relief From Mistake of Fact Which Prevents Redemption.—A mistake of fact allows equitable relief in favor of the owner of land sold for taxes, and redemption therefrom; and where the owner of land sold for taxes applies to the proper officer within the statutory period for redemption to redeem it from a tax sale, and the officer demands a certain sum for the purpose, and issues a certificate of redemption, such facts entitle the land owner to redeem in equity from a valid tax sale, of which he had no knowledge at the time he offered to redeem, and after the statutory period has expired and the deed under the

latter sale has been made to the tax sale purchaser: But upon such redemption, the land owner must pay such purchaser the redemption money, penalty and interest, pp. 560, 561.

Reaffirmed in Shoemaker v. Lacey, 38 Iowa 277, 278.

Reaffirmed, explained and extended in Corning Town Co. v. Davis, 44 Iowa 624-626 (cited in dissenting opinion, 636), holding further that where a land owner or other person entitled to redeem before the expiration of the statutory period for redemption, leaves money with the clerk of the district court sufficient to pay all taxes on the land, and to redeem from all tax sales therefor, with directions to the clerk to examine the record, pay all taxes thereon, and redeem from all tax sales thereof, the fact that the clerk fails to make redemption from such a tax sale, will not preclude such owner or other person entitled to redeem, from maintaining an action in equity therefor, after the expiration of the statutory period.

Reaffirmed and extended in Bitzer v. Becke, 120 Iowa 69, 70, 94 N. W. 288, holding further that equitable circumstances, no matter how new or complicated, may justify a court in extending the right to redeem from a tax sale of land beyond the statutory period; and that on general principles, a court of equity may extend such period.

Cited in Fenton v. Way, 40 Iowa 197, 198, the court holding that where an owner of land redeems from a tax sale thereunder, a tax deed thereafter executed, passes no title, and a purchaser thereof from the tax sale purchaser will not be protected as against the land owner, although the tax record did not show the redemption, and the last purchaser became such without notice.

Distinguished in Moore v. Hamlin, 38 Iowa 483, holding that where, after his purchase of land previously sold for taxes, a purchaser inquires of the county treasurer whether there are any "back taxes" thereon, but not whether it had "previously been sold for taxes," and is answered in the negative, but it does not appear that the purchaser, at the time of making the inquiry, was prepared or ready to redeem, such facts do not authorize a redemption by such purchaser from such a prior tax sale after the statutory period of redemption.

Distinguished in Shoemaker v. Lacy, 45 Iowa 424, the court holding that where a sale of land for taxes is unauthorized by law, it and all things done thereunder are void, and redemption therefrom is unnecessary.

Unreported citation, 89 N. W. 194.

CALLAHAN v. BURLINGTON & MISSOURI R. R. CO., 23 IOWA 562

1. Master and Servant—Liability of Master for Acts of Servant.—In order for a master to be liable for the acts of his servant it is necessary that the former's control over the latter should be of such a character as to enable him to direct the manner of performing the

services, and to prescribe what particular acts shall be done in order to accomplish the end intended: The responsibility of the master grows out of, is measured by and begins and ends with his control of the servant, p. 564.

Reaffirmed in *Hughbanks v. Boston Investment Co.*, 92 Iowa 277, 60 N. W. 644.

Reaffirmed, explained and extended in *Johnson v. Owen*, 33 Iowa 515, holding that the relation of master and servant may be established, as are all other facts, by evidence which, in law, will raise a presumption of its existence: Holding further that when a person holds another out as his servant and as being liable for his acts within the rule, he is liable to one who acts and relies upon such conduct, for the acts of the person so held out.

Special cross reference. For further cases, citing, sustaining, and explaining the text, and others, see annotations under *Kellogg v. Payne*, (21 Iowa 575), Vol. II, p. 936.

FIRST CONSTITUTIONAL PRESBYTERIAN CHURCH OF IOWA CITY v. THE CONGREGATIONAL SOCIETY, 23 Iowa 567

1. Religious Societies—Churches—Property Conveyed in Trust for—Diversion from Trust Purposes—Rights of Members in Equity.—Where real property is conveyed to trustees and their successors for the use of an unincorporated religious society or association, to be used by it for certain religious purposes, neither the trustees or a majority of the members of the society or association may divert it from the use or purposes for which it was conveyed. A lease of such realty by the trustees or a majority of the members of the society or association to another religious society or association is void, and will be set aside in equity, upon complaint of any one of the trustees, or members of the first organization, pp. 573-575.

Reaffirmed in *Mt. Zion Church v. Whitmore*, 83 Iowa 147, 149, 155, 156, 13 L. R. A. 198, 49 N. W. 81, holding that property given or set apart to a church or religious association, for its use in the enjoyment and promulgation of its adopted faith and teachings, is by such church or association held in trust for that purpose, and no member or members of the church or association, less than the whole, may divert it therefrom: And that where a majority of the members depart from the original faith and covenants of the church, and have diverted such property from the purpose for which it was given or granted, equity will restore it to the minority for such use, upon complaint of any member or trustee thereof.

Cited in *Hervey v. Buchanan*, 47 Iowa 591, 592, the court holding that where land is conveyed to trustees of an unincorporated association, the title vests in the trustees for the use of the association, and is subject to the latter's control, and may be sold and disposed of by it.

STATE v. PATTERSON, 23 IOWA 575

1. Criminal Law—Bail Bond—Action on—Presumption as to Validity—Defenses.—In an action against the sureties on a bail bond taken by a justice holding the accused to answer a criminal charge in the district court, the state need not aver and prove that the justice had jurisdiction of the offense, and held the accused upon finding that there was sufficient reason to believe him guilty; such matters are defenses to the defendants, sureties, pp. 577, 578.

Reaffirmed and explained in State v. Hufford, 23 Iowa 582.

Reaffirmed and explained in State v. Wright, 37 Iowa 526, 527, holding that it is presumed from the execution of a bail bond that the accused was released thereunder; and that if the surety in an action thereon desires to claim relief or discharge for other causes, he must plead and prove facts sufficient therefor.

(Note.—See further sustaining and explaining, but not citing, the text, Furguson v. State, 4 Greene, 302, 61 Am. Dec. 120.—Ed.)

STATE v. HUFFORD, 23 IOWA 579

(Later Appeal, 28 Iowa 391.)

1. Criminal Law—Bail Bond—Action on—Presumption as to Validity—Defenses.—In an action against the sureties on a bail bond taken by a justice holding the accused to answer a criminal charge in the district court, the State need not aver or prove that the justice had jurisdiction of the offense and held the accused upon finding that there was sufficient reason to believe him guilty; such matters are defenses to the defendants, sureties, p. 582.

Special cross reference. For cases citing the text, see annotations under State v. Patterson (23 Iowa 575), ante., next preceding.

WETHERILL v. BROBST, 23 IOWA 586

1. Evidence—Parol Evidence to Vary or Control Written Instrument—Contract Granting Easement.—Parol evidence is inadmissible to vary or control a written instrument.

So where a party grants an easement over his land by a written contract, he cannot prove by parol that the right given was a mere personal privilege, revocable at will; as an easement is irrevocable at the will of the grantor, pp. 588, 589.

Reaffirmed and explained as to first paragraph in Doolittle v. Murray & Co., 134 Iowa 549, 552, 111 N. W. 1004, holding that where the parties have in writing declared in clear and unambiguous terms, the purpose of their agreement, that declaration cannot be denied or varied by proof of prior or contemporaneous parol agreements.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under *Karmuller v. Kratz* (18 Iowa 352), Vol. II, p. 646.

2. Vendor and Purchaser—Contracts to Convey Land or Easement—Vendor Unable to Perform—Election of Purchaser—Specific Performance.—Where a person enters into a contract to convey land with warranty, and thereafter becomes partially unable to perform it, the purchaser may sue at law for damages and recover the purchase price, or he may elect to sue in equity and obtain a specific performance of the contract as far as is practicable, or a conveyance to the extent of the title of the vendor.

This rule applies to a contract to convey an easement over land, pp. 589, 590.

Reaffirmed and explained as to first paragraph in *Brown v. Ward*, 110 Iowa 127, 128, 81 N. W. 249, holding that where performance of a contract to convey land has been rendered wholly impossible, the purchaser must proceed in an action at law for damages; but that where partial performance may be made by the vendor, the purchaser, if willing to accept it, may have such specific relief in equity.

Cited in *Putman v. Haltey*, 24 Iowa 428, the court holding that a contract for the conveyance of a right of way will be specifically enforced in equity.

Cross reference. See further on this question, annotations under Rule 2 of *Presser v. Hildenbrand* (23 Iowa 483), ante. p. 127.

CLAY v. ALCOCK, 23 IOWA 591

1. Pleading—Failure to Deny Allegations Cured by Trial on Merits.—The failure of a party to deny affirmative averments in his adversary's pleading is cured by a trial on the merits whereon they are treated as denied, and where it appears that substantial justice was done, p. 593.

Reaffirmed and extended in *Long, Adm'r v. Valleau*, 87 Iowa 684, 55 N. W. 34, holding further that where a party treats affirmative allegations in his pleading as denied, and proceeds to a trial on the merits, he thereby waives the want of denial.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

Special cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 2 of *Doniphan & Hughes v. Street* (17 Iowa 317), Vol. II, p. 533.

MONROE v. GRAVES, 23 IOWA 597

(Abstract.)

1. Resulting Trust—Parol Evidence to Establish—Sufficiency.—In order to establish a resulting trust by parol evidence against the

holder of the legal title to property, and contrary to such title, the proof must be clear, satisfactory and conclusive, pp. 598, 599.

Reaffirmed and explained in Ensminger v. Ensminger, 75 Iowa 90, 39 N. W. 209, 9 Am. St. Rep. 462, holding that evidence to establish that a deed absolute on its face was intended to be a mortgage, or that the real estate described therein belongs in fact to some other person than the grantee, must be clear, satisfactory and conclusive, and not made up of loose and random statements.

Reaffirmed and extended in Trout v. Trout, 44 Iowa 474, holding further that where a witness attempts to repeat conversations occurring several years before he testifies, that his evidence relating thereto should be closely scrutinized and received with great caution.

Cross reference. See further on this question, annotations and cross reference under Rule 2 of Sunderland v. Sunderland (19 Iowa 325), Vol. II, p. 733.

Annotations to Decisions Reported in Volume 24 Iowa

LYON v. McILVAINE, 24 IOWA 9

1. Mortgage on Real Estate—Subsequent Purchase of Absolute Title by Mortgagee—Merger of Estates—When Merger Not Applied in Equity.—It is a well settled rule in equity that where a mortgagee, subsequent to his mortgage, acquires an absolute title to the real estate mortgaged, the mortgage will not be held to be merged in the absolute title, when the interest, or intention of the mortgagee intervenes to prevent the merger, pp. 12, 13.

Reaffirmed in Fordyce v. Hicks, 76 Iowa 45, 40 N. W. 81.

Reaffirmed and explained in McCormick v. Merritt, 131 Iowa 163, 105 N. W. 429, holding that the question of whether or not there is a merger under the circumstances of the text, ordinarily depends largely upon the intent of the parties.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others on the question, see annotations under Rule 2 of Wilhelmi v. Leonard (13 Iowa 330), Vol. II, p. 157.

Cross reference. See further on this question, annotations under Rule 2 of Vannice v. Bergen (16 Iowa 555), Vol. II, p. 472.

2. Insolvent Debtor—Mortgage to Secure Particular Creditors—Subsequent General Assignment.—The execution of a mortgage to secure a particular creditor, or set of creditors, is not made void by the fact that the mortgagor made it in contemplation of insolvency, and immediately thereafter executed a general assignment.

Sec. 1826 of the Code of 1860, renders void, only a general assignment with preference to creditors, p. 13.

Special cross reference. For cases citing the text, and many others, see annotations under Rule 3 of Fromme v. Jones (13 Iowa 474), Vol. II, p. 176.

Cross reference. See further on this question, annotations under Lampson & Powers v. Arnold (19 Iowa 479), Vol. II, p. 751.

GAGE v. SHARP, 24 IOWA 15

1. Negotiable Note—Innocent Holder for Value—Defenses.—The fact that a note payable to a payee or bearer is negotiated to another than and not to the payee, is not of itself sufficient to charge the taker with notice of a defect therein, as against the maker, p. 20.

Reaffirmed in Laub v. Rudd, 37 Iowa 619, 620.

Reaffirmed and explained in Lake v. Reed, 29 Iowa 259, 4 Am. Rep. 209, holding that the right of a *bona fide* holder of negotiable paper, for value, in the usual course of business, cannot be defeated by proof that he was negligent, and omitted to make inquiries which common prudence would have dictated.

Reaffirmed and explained in Pond v. Waterloo Agricultural Works, 50 Iowa 600, holding that to charge the holder of a negotiable promissory note with notice of infirmities, he must have been guilty of something more than mere negligence in taking the note.

Reaffirmed and explained in Lehman v. Press, 106 Iowa 393, 76 N. W. 819, holding that because of the commercial character of negotiable paper, and the need of sustaining its negotiable quality, it cannot be impeached in the hands of a holder for value and before maturity, unless acquired under circumstances such as indicate actual fraud by the party taking it: That in an action by such holder, in order to defeat his recovery, he must be shown, by direct or circumstantial evidence, to have taken the paper with knowledge or notice of its infirmities, or the circumstances must be such as indicate willful neglect to inquire, or such gross carelessness in failing to do so, when inquiry would have led to such knowledge, as shall establish bad faith.

Reaffirmed and extended in Sully v. Goldsmith, 32 Iowa 399, holding further that a *bona fide* holder for value, of a negotiable note is entitled to recover thereon against the maker although it was obtained by fraud, where he took without notice thereof.

Reaffirmed and extended in Wright, Dryden & Co. v. Flinn, 33 Iowa 162, holding further that where through the carelessness of the maker a negotiable note is given to another, it is binding upon the maker in the hands of an innocent holder.

Reaffirmed and extended in Leland v. Parriott, 35 Iowa 455, 456, holding further that where, after a negotiable note has been indorsed by the payee, a subsequent holder indorses on the back thereof an agreement not to sell or dispose of it, such indorsement does not affect its negotiability, nor preclude a later holder, for value, from recovering thereon against the maker.

Reaffirmed and extended in Cook v. Weirman, 51 Iowa 564, 2 N. W. 389, holding further that where a negotiable note is valid on its face, it will be protected in the hands of a holder for value, who takes before maturity, from all infirmities and defenses, unless the holder enforcing it was guilty of actual bad faith in taking it: That even gross negligence on the part of such a holder in failing to ascertain infirmities and defenses will not defeat recovery.

Reaffirmed and extended in Graff v. Logue, 61 Iowa 708, 17 N. W. 172, holding further that where one person delivers to another his negotiable promissory note under an agreement that it is not to be put in circulation until the happening of some event, or that in a

certain contingency the note is not to be considered as delivered, and the person to whom it is delivered, in violation of the agreement, puts it in circulation, an innocent indorsee may maintain an action thereon, notwithstanding the violation of the agreement.

Cited in Stoddard v. Burton, 41 Iowa 587, the court holding that mere suspicion that a person in possession of a note payable to bearer may not be the owner, will not exonerate the maker from payment; but that in order to enable the maker to refuse to pay such a note to the holder, there must be circumstances amounting to clear proof that he is a fraudulent holder; and that a payment by the maker to the holder in the absence of such circumstances or proof, exonerates him, and amounts to a satisfaction of the note.

Distinguished in Crossley v. Stanley, 112 Iowa 26, 83 N. W. 806, 84 Am. St. Rep. 321, holding that a surety has the right always to impose any limit he chooses to his liability: That he may always fix the precise terms upon which he is willing to become a surety, no matter whether the terms seem to be material or immaterial, and one who takes his contract with knowledge of the limitations, cannot enforce it against him.

Cross references. See further on this question, annotations under McCramer v. Thompson (21 Iowa 244); Trustees of Iowa College v. Hill (12 Iowa 462), Vol. II, pp. 898 and 75, respectively.

PACKER v. PACKER, 24 IOWA 20

1. Appeal From Justice's to District Court—Costs—Affidavits in Support of Motion to Award and Tax—Practice—Discretion of District Court—Abuse of—Reversal on Appeal.—Upon a motion to award and tax costs, upon an appeal from a justice's to the district court, the latter has a large judicial discretion, and may—under the Code of 1860—decide upon affidavits and counter-affidavits filed, or, if they leave the matter in doubt, or if the court prefers, order the affiants to come into court and subject them, or allow them to be subjected, to an examination and cross examination; and the court may receive any further testimony offered by either party.

In matters of practice of this character, the Supreme Court is not justified in interfering with the course of the court below, unless it abused its discretion to the prejudice of the party complaining, p. 23.

Special cross reference. For cases citing, and sustaining the text and others on the question, see annotations under Arthur v. Funk (22 Iowa 238), ante. p. 25.

2. Evidence—Receipt Is Prima Facie Evidence.—A receipt for money is *prima facie* evidence, and may be explained, varied, controlled, or contradicted by other proof, p. 23.

Special cross reference. For cases citing, sustaining, explaining, etc., the text, and others, see annotations under Rule 1 of *Levi v. Karrick* (13 Iowa 344), ante. p. 160.

Cross reference. See further on this question, annotations under Rule 1 of *Sullivan v. Collins* (18 Iowa 228), Vol. II, p. 617.

STATE v. EMILY, 24 IOWA 24

1. Criminal Law—Bail Bond—Failure of Clerk to Mark “Accepted”—Effect.—The failure of the district court to mark a bail bond “accepted,” does not affect its validity, when it is marked “filed and approved,” by that officer, p. 25.

Reaffirmed in *State v. Wells*, 36 Iowa 240.

2. Criminal Law—Bail Bond—Forfeiture—Rearrest of Accused—Effect.—Where, after forfeiture of a bail bond, the district court orders the accused to be arrested upon a bench warrant, and holds him for trial, the state may nevertheless recover against the sureties on the bond, on the previous forfeiture, p. 26.

Reaffirmed and varied in *State v. Sandy*, 138 Iowa 583, 116 N. W. 600, holding that appearance of accused in court to answer the charge, after forfeiture of the bail bond, does not release the sureties thereon from liability—under the Code of 1897—when the accused does not show a sufficient excuse for his non-attendance at the time forfeiture was entered.

PRATHER & PARR v. PARKER, SHERIFF, 24 IOWA 26

1. Sales of Personal Property—Seller Retaining Possession—Rights of Creditors.—Under Sec. 2201 of the Code of 1860, a sale of personal property is invalid against existing creditors of the seller, when he retains actual possession, unless a written instrument conveying the property is executed, acknowledged and filed for record, p. 27.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under *Court-right & Co. v. Leonard* (11 Iowa 32), Vol. I, p. 766.

Cross references. See further on this question, annotations under *Day v. Griffith* (15 Iowa 104), Vol. II, p. 310. See, also, in this connection, annotations under *Thomas v. Hillhouse* (17 Iowa 67); Rule 3 of *Rindskoff Bros. & Co. v. Lyman, sheriff* (16 Iowa 260), Vol. II, pp. 495, and 434, respectively.

SHERRADEN v. PARKER, 24 IOWA 28

1. Principal and Surety—Judgment Against Both—Discharge of Surety by Abandonment of Execution Levied.—The levy of an execution upon property is, as between the parties to an action, a *prima facie* satisfaction of the judgment; and where property held by

a surety is levied upon to satisfy a judgment against the principal and such surety, and such levy is afterward abandoned and the property placed in the possession of the principal, such acts release the surety, pp. 30-32.

Reaffirmed and explained in Hendryx v. Evans, 120 Iowa 316, 317, 94 N. W. 855, holding that when property of the principal has come under the control of the creditor, either by voluntary act of the debtor, or by process sued out by the creditor, for the purpose of being applied on the debt, a voluntary relinquishment thereof will discharge the surety to an extent corresponding to its value.

Reaffirmed and extended in Bedwell v. Gephart, 67 Iowa 47, 24 N. W. 586, holding further that the release of real estate of the principal from the lien of a judgment, or the discharge of a levy whereby a lien on property of the principal has been created, discharges the surety to the extent of the value of the property released: But this rule does not apply where such act is done by the creditor in the compromise of a doubtful claim, or lien, and the amount received by the creditor is credited on the amount of the judgment.

Reaffirmed and varied in Mingus v. Daugherty, 87 Iowa 58, 60, 61, 43 Am. St. Rep. 354, 54 N. W. 66, holding that when a creditor holds a landlord's lien for the debt due to him, it is a security; and if, through his act or neglect, that security is lost, in whole or in part, without the consent of a personal surety, it works a discharge of the personal surety, to the extent of the security lost.

Cited in Valley Nat'l Bank v. Des Moines Nat'l Bank, 116 Iowa 546, 90 N. W. 343, holding that where a creditor having a judgment lien on his debtor's land, levies an execution under the judgment on the debtor's personalty, such levy operates as a satisfaction of the judgment lien on the land in favor of subsequent mortgagees, or judgment creditors.

Cross reference. See further on this question, annotations under Rule 3 of Chambers v. Cochran and Brock (18 Iowa 159), Vol. II, p. 606.

OLMSTEAD v. BOARD OF SUPERVISORS OF HENRY COUNTY, 24 Iowa 33

1. Illegal Taxation—Injunction to Restrain Collection.—Injunction lies to restrain the collection of taxes illegally levied and assessed, p. 34.

Reaffirmed in Zorger v. Township of Rapids, 36 Iowa 180.

Reaffirmed and explained in Rood v. Board of Supervisors of Mitchell County, 39 Iowa 446, holding that if a tax is illegal, and not merely irregular or erroneous, its enforcement will be restrained by injunction.

Cited in Brockman v. City of Creston, 79 Iowa 592, 44 N. W. 823, the court holding that a tax payer of a city, whether he be a resi-

dent or a non-resident thereof, may maintain a bill to enjoin it and its officials from unlawfully selling or disposing of municipal property.

Cross references. See further on this question, annotations under Rule 1 of *Litchfield v. Polk County* (18 Iowa 70); *Macklot v. City of Davenport* (17 Iowa 379), Vol. II, pp. 587 and 541, respectively.

MORRISON v. MARQUARDT, 24 IOWA 35, 92 AM. DEC. 444

1. Parol Dedication of Land to Public Use—Sufficiency of Evidence to Establish—Intent to Be Clear.—Land may be dedicated to public use by parol; but when such a dedication is relied on, the intent to dedicate must be clear, and the acts or circumstances to establish that intention must be unequivocal and convincing, p. 54.

Reaffirmed in *O'Malley v. Dillenbeck Lumber Co., and Ch., M. & St. P. R. R. Co.*, 141 Iowa 191, 119 N. W. 603.

Reaffirmed and explained in *Snouffer v. C. R. & M. City Ry. Co.*, 118 Iowa 296, 297, 92 N. W. 83, holding that dedication of realty to public use may be accomplished without any deed or formal act by the dedicator, and without any formal declaration of acceptance by the public authorities; and the dedication may be shown by the verbal declarations of the owner, by his act in filing the plat, by his silence in the face of known adverse possession by the public, or by any other act or omission from which the intention to dedicate may fairly be inferred; while acceptance may also be inferred from general use of the way by the public, or by the improvement and repair of the way by the authorities having care and control of the highways.

Reaffirmed, explained and qualified in *Fisher v. Beard*, 32 Iowa 352, 354, holding that the mere oral declarations, and acts of the owner of land, though followed by use and enjoyment by the public, for a long or a short time, are not of themselves sufficient to warrant the presumption of a dedication; but that where the owner of an open and unoccupied parcel of land in a city, represents it as a public square thereof, he cannot thereafter deny the fact of its dedication to public use, as against those who have dealt on the strength of such representation.

Reaffirmed and extended in *State v. Birmingham*, 74 Iowa 410, 411, 38 N. W. 123, holding further that to constitute a highway by prescription the road must have been occupied and used by the public under a claim of right to it as a highway, with the knowledge of the owner of the land, for a period of more than ten years: But the dedication may be shown by writing, by declaration, or by conduct of the land owner; and if he knows for a series of years that the public is using and treating a road as a highway, expending funds in its improvement and he acquiesces therein, this is evidence of an actual dedication.

Cross references. See further on this question, annotations under *Onstott v. Murray* (22 Iowa 457), Vol. III, p. 56; *City of Pella v. Scholte* (21 Iowa 463), Vol. II, p. 925.

2. Easements by Implication—Easement Defined.—The doctrine of implied easements rests upon the supposed intention of the parties, as deduced from the situation and condition of the two estates to which the easement relates.

An easement may be briefly defined to be a charge or burden upon one estate (the servient) for the benefit of another (the dominant), p. 61.

Special cross reference. For cases citing the text, and others in this connection, see annotations under *Karmuller v. Krotz* (18 Iowa 352), Vol. II, p. 646.

BARLOW *v.* MCKINLEY, 24 IOWA 69

1. Deeds—Covenants Against Incumbrances—Recovery of Damages by Grantee for Breach Although He Took With Knowledge—Railroad Right of Way Is An Incumbrance.—A grantee may recover upon a covenant against incumbrances in a deed containing no exceptions or reservations, although he had full knowledge thereof at the time he accepted the conveyance: And a railroad right of way over land is an incumbrance, p. 70.

And see 151 Iowa 742, 744, 130 N. W. 899, 901, 902.

Special cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 2 of *Van Wagner v. Van Nostrand* (19 Iowa 422), Vol. II, p. 744.

2. Deeds—Covenant Against Incumbrances—Incumbrance Defined.—An incumbrance is defined to be a right in a third person in the land in question, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance, p. 70.

Cited with approval in *Stokes v. Maxson*, 113 Iowa 124, 86 Am. St. Rep. 367, 84 N. W. 950, the court holding that a contract of a wife who owns a homestead consisting of a dwelling and lot, granting another the right to a joint use of a stairway which is part of the dwelling, when the use granted does not interfere with the substantial enjoyment of the homestead, is not a contract to incumber the homestead, and is not required to be joined in by the husband, under Sec. 2974 of the Code of 1897, in order to be valid.

DUNTON *v.* WOODBURY, 24 IOWA 74

1. Homestead — Abandonment — Proof of — Absence from, Weight as Evidence.—While the length of the time of absence from a homestead is not conclusive upon the question of abandonment, yet,

where there are no circumstances or acts of the party, manifesting a purpose to return and occupy it as a homestead, the length of time becomes an important factor in determining the question of intention to return.

It requires stronger and clearer proof of the abandonment of a homestead when it is sought to be subjected to a debt or lien which was created or which attached while it was actually occupied by the debtor, than when such a debt or lien is created or arises when the debtor claiming the exemption was not in actual possession thereof, p. 76.

Reaffirmed and explained in Robinson v. Carleton, 104 Iowa 298, 73 N. W. 617, holding that in an action to set aside a sale and deed to homestead under an execution, where the homestead is once shown to have existed, the burden is on the defendant (purchaser) to prove an abandonment thereof by the debtor.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others on the question, see annotations under Rule 1 of Fyffe v. Beers (18 Iowa 4), Vol. II, p. 573.

Cross reference. See further on this question, annotations under Davis, Moody & Co. v. Kelley (14 Iowa 523), Vol. II, p. 279.

LAWRENCE v. SINNAMON, 24 IOWA 80

1. Husband and Wife—Joint Liability for Expenses of Family, Etc.—Contract of Husband for—Limitation of Action Against Both.—Under Sec. 2507 of the Code of 1860, husband and wife are jointly or severally liable for debts contracted for the expenses, or necessities of the family, education of the children, etc.; and where a husband contracts such a debt, and executes his note in payment therefor, the cause of action against both accrues, and limitation commences to run from the maturity of the note.

But in an action on such note or other contract, the wife may escape liability by showing that the creditor agreed to look to the husband alone for the payment of the debt, pp. 82, 83.

Reaffirmed as to first paragraph in Davidson v. Biggs, 61 Iowa 310, 16 N. W. 135; Waggoner v. Turner, 69 Iowa 128, 129, 28 N. W. 568; Morse & Littell v. Minton, 101 Iowa 607, 70 N. W. 693.

Reaffirmed, explained and qualified in McCartney & Sons v. Carter, 129 Iowa 23, 3 L. R. A. (New Series) 145, 105 N. W. 340, holding—under Sec. 3165 of the Code of 1897—that the liability of a wife for family expenses is purely statutory, and cannot be enlarged by any act of the husband, and should not be enlarged by prejudicial construction: That a note given by the husband for family expenses is not alone conclusive on the wife, either as to the existence of the debt or as to the amount thereof; but that although the note of the husband may extend the time of payment, and the husband is allowed

to change the form or evidence of the debt, the wife's liability follows the original debt, and that only, and is determined solely thereby.

Reaffirmed and qualified in Schurz v. McMenemy, 82 Iowa 434, 435, 48 N. W. 806, holding that a wife is not liable—under Sec. 2214 of the Code of 1873, corresponding to the section of the text—for her husband's breach of an executory contract for necessities or expenses of the family: Hence holding that a wife is not liable for her husband's breach of a contract for the lease of a dwelling, which was never used by the family, or when the rents for the period during which it was so used and before the breach of contract occurred was fully paid.

Cited in Smedley v. Felt, 41 Iowa 590, 591, the court holding that a husband and wife are jointly and separately bound for the purchase price of a piano purchased on account of and to be used in the family, although it is purchased by the husband, and the seller takes his individual note therefor: But if, in such case, the seller agrees to look *alone* to the husband for payment, the wife is not liable.

Cited in Frost v. Parker, 65 Iowa 182, 183, 21 N. W. 508, the court holding that both husband and wife are liable for the purchase price of an organ; that the liability of the wife continues as long as the right of action against the husband continues; that the seller is not limited to a personal judgment against the wife; and that the assignee of a judgment creditor (of seller) against the husband therefor may sue in chancery to subject the lands of the wife to its satisfaction.

Cited in Boss v. Jordan, 118 Iowa 205, 89 N. W. 1070, the court holding that a creditor who has obtained a judgment against the husband for family expenses may in an equitable action subject the property of the wife to the payment thereof, without first recovering a judgment at law against the wife.

Cited in Van Doran v. Marden, 48 Iowa 188, not in point.

Distinguished as to first paragraph in Polly v. Walker, sheriff, 60 Iowa 88, 89, 14 N. W. 138, holding that if a creditor sues a husband alone for a debt contracted for family expenses or necessities, the fact that the husband consents to judgment against him, does not operate to extend the running of the statute of limitation on the cause of action against the wife for such debt.

Cross reference. See further on this question, annotations under Rule 2 of Finn & Co. v. Rose, (12 Iowa 565), Vol. II, p. 96.

STATE v. MUNZENMAIER, 24 IOWA 87

1. Grand Jury—Selection of—When Panel May be Filled by Bystanders.—When any of the grand jurors summoned by the sheriff according to his precept fail to appear when called, the panel may be filled by bystanders, pp. 89, 90.

Reaffirmed and qualified in State v. Miller and Kremling, 53 Iowa 86, 4 N. W. 840, holding that under Sec. 244 of the Code of 1873, when none of the grand jurors summoned by precept appear, the court may issue a new precept for the summoning of other qualified men to serve as such jurors; but that when a part of the jurors summoned fail to appear, the panel may be filled by bystanders or talesmen.

Cross reference. See further on this question, annotations under Rules 5 & 6 of State v. Reid (20 Iowa 413); Rule 1 of State v. Knight (19 Iowa 94), Vol. II, pp. 833 and 697, respectively.

ADAMS v. BOIES & BARRETT, 24 IOWA 96

1. **Principal and Agent—Apparent Authority of Agent—Liability of Principal.**—A principal is liable for the acts of his agent within the scope of powers he has allowed him to exercise, to one dealing with him in reliance thereon, although the agent's authority be expressly limited, if the limitation is not, at the time of the transaction, known to the other party, p. 98.

Cited in Mordhurst v. Boies & Barrett, 24 Iowa 99.

MORDHURST v. BOIES & BARRETT, 24 IOWA 99

1. **Principal and Agent—Power of Agent to Borrow Money Not Inferred from Power to Draw Checks—Principal Benefited by Money Borrowed, Liability of.**—An agent has no right to borrow money on the responsibility of his principal, unless he is authorized by his principal to do so, or unless authority to do so can be justly inferred from the acts of the principal in connection with the business of the agency; and power to an agent to draw checks in payment of property purchased for his principal, does not authorize him to borrow money in the name of his principal: But where an agent, even without authority therefor, borrows money *as agent*, and it is used for the benefit of the principal, the latter is liable, pp. 100-102.

Cited in Wycoff, Seaman & Benedict v. Davis, 127 Iowa 403, 103 N. W. 350, the court holding that a power to an agent to sell property and collect the purchase price, does not authorize him to mortgage it; and such a mortgage is of no binding effect on the principal, unless ratified by him.

STATE v. ORWIG, 24 IOWA 102

(Later Appeal, 27 Iowa 528.)

1. **Larceny and Embezzlement—What Subject of—"Property" Defined.**—Under Sec. 4244 of the Code of 1860, any bond, promissory note, or other mere evidence of indebtedness is the subject of larceny, or embezzlement.

"Property" within the meaning of statutes denouncing such crimes, includes money, goods, chattels, *evidences of debt* and choses in action, pp. 105, 106.

Reaffirmed and extended in State v. Patty, 97 Iowa 377, 66 N. W. 728, applying the rule to the crime of obtaining money by false pretenses.

Cited in Nordyke v. Charlton & Stalker, 108 Iowa 417, 79 N. W. 137, the court holding that the word "property" includes both real and personal, and the words "personal property" include money, goods, chattels, evidence of debt, and things in action: And that promissory notes are evidences of debt, and things in action are therefore personal property, within the meaning of the statute—The case otherwise turning on other points.

Cited in State v. Brandt, 41 Iowa 625, (dissenting opinion), the majority court opinion turning on other questions connected with embezzlement, and the sufficiency of an indictment thereof.

WHITE v. POORMAN, 24 IOWA 108

1. New Trial—Discretion of Trial Court—Appeal from Order Granting—Reversal, When.—The trial court has a large judicial discretion in the matter of granting or refusing a new trial on a ground not involving a proposition of law only; and a stronger case of abuse of discretion and resulting prejudice to the substantial rights of appellant must be shown by the record in order to justify a reversal, upon an appeal from an order granting than from an order refusing a new trial, p. 114.

Special Cross reference. For cases citing and explaining the text, and many others, see annotations under Rule 1 of Newell v. Sanford (10 Iowa 396), Vol. I, p. 712.

Cross reference. See further on this question, annotations under Shepherd v. Brenton (15 Iowa 84), Vol. II, p. 308.

2. Actions to Recover Real Property—New Trial in—Discretion of Court.—In an action to recover possession of real estate the trial court has a greater latitude and discretion in the matter of granting a new trial than in other cases, and is not limited to the grounds for new trial which are set out in Secs. 3112-3120 of the Code of 1860, p. 114.

Distinguished in Russell v. Nelson, 32 Iowa 218, holding that the rule is inapplicable to actions to quiet title to real estate.

Special Cross reference. For further cases citing and sustaining the text, see annotations under Rule 2 of Newell v. Sanford (10 Iowa 396), Vol. I, p. 712.

3. Actions for Recovery of Real Estate—New Trial Granted by Trial Court—Negligence of Unsuccessful Party or Attorney Causing Result of First Trial—When not Cause for Reversal.—When the district court has granted a new trial in an action for the

recovery of real property, and it does not appear that the negligence of the unsuccessful party or his attorney produced the result on the first trial, although they may not have been entirely without blame in that particular, the Supreme Court will not reverse such order as being an abuse of the discretion conferred on the district court by Sec. 3584 of the Code of 1860, p. 117.

Cited in Robins v. Modern Woodmen of America, 127 Iowa 450, 103 N. W. 377, the court holding that a new trial will not be granted when the first result was caused by the gross negligence of the party applying therefor.

4. Appeal—Judgment in Supreme Court Without Prejudice to Rights of Party in Court Below.—When a motion of appellee to affirm the judgment below because of the failure of appellant to prosecute the appeal with diligence, and a motion of appellant to dismiss the appeal, are both pending in the Supreme Court at the same time, the court may order the judgment affirmed, the affirmance not to prejudice or affect the right of appellant to a new trial below, p. 117.

Cited in Bevering v. Smith, 121 Iowa 617, 96 N. W. 1114 (dissenting opinion), the majority court holding that an affirmance on motion, of a judgment in an action for the recovery of real estate, does not preclude the appellant from applying for a new trial in the court below within the statutory period allowed therefor, and for grounds not presented below before the appeal.

DEFORD v. MERCER, 24 IOWA 118, 92 AM. DEC. 460

1. Guardian and Ward—Sale of Land by Guardian—Estoppel of Ward to Question Validity—Acceptance of Purchase Money.—Where a ward, *with full knowledge of all the facts*, there being no fraud or mistake, and nothing to repel the presumption that he knew his legal rights, but much to show that he did fully know them, voluntarily accepts and retains the purchase money arising from the sale of his land, he cannot afterward claim the land itself; but he is equitably estopped to deny the validity of the sale.

This rule applies to a ward who, with knowledge of the facts, and upon attaining majority, accepts the purchase price of an unauthorized sale of his land by his guardian; and he cannot thereafter claim the land, or attack the validity of the sale, pp. 122, 123.

Reaffirmed in Krutzson v. Vidders, 126 Iowa 517, 102 N. W. 435, holding that heirs cannot knowingly take of the proceeds of an unauthorized sale made for full value, and then be permitted to go behind the sale and claim an interest in the land itself.

Reaffirmed as to first paragraph in Rump v. Schwartz, 67 Iowa 474, 25 N. W. 737.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

STATE v. VERDEN, 24 IOWA 126

1. Criminal Law—Nuisance—Indictment for—Sufficiency of Description of Premises—Variance.—On the question of whether or not an indictment for maintaining a nuisance in a saloon next door west of "Chambers' store," was sustained by proof of defendant's maintaining a nuisance in a saloon next door west of "Chamberlain's store," the court is equally divided in this case, pp. 127, 128.

Cited in State v. Judd, 132 Iowa 298, 11 Am. & Eng. Ann. Cas. 91, 109 N. W. 893, not in point.

Cross references. See further on this question, annotations under Rule 1 of State v. Schilling (14 Iowa 455); State v. Kreig (13 Iowa 462), Vol. II, pp. 267 and 174, respectively.

MILLER v. ALBAUGH, 24 IOWA 128

1. Judgment—Vacation of for Fraud—False Statement in Pleading.—It may admit of question whether a false statement in a pleading, which the opposite party has a full and fair opportunity to deny, can under any circumstances, amount to fraud, or will be cause for the vacation of a judgment, p. 130.

Unreported citation, 86 N. W. 372.

Special Cross reference. For further cases citing the text and others on the question, see annotations under Dixon v. Graham (16 Iowa 310), Vol. II, p. 440.

2. Judgment—Vacation of—Petition for—Allegations and Proof Required.—In order for one to obtain a vacation of a judgment under Sec. 3499 of the Code of 1860, for fraud practiced by the successful party, or for unavoidable casualty or misfortune preventing him from prosecuting or defending, he must aver and prove the exercise of due diligence on his part, as well as the existence of a good cause of action or defense, p. 131.

Reaffirmed in Heathcote v. Haskins & Co., 74 Iowa 569, 38 N. W. 419, under the Code of 1873.

Reaffirmed in Dryden v. Wyllis, 51 Iowa 535, 1 N. W. 704, holding that under Sec. 3159 of the Code of 1873, a judgment against a defendant will not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered.

Reaffirmed in Scott v. Hawk, 105 Iowa 469, 75 N. W. 368, holding that—under Sec. 4092 of the Code of 1897—reasonable diligence must be alleged and proven in order to obtain a new trial on petition; and that affidavits in support of a motion for a new trial on the ground of newly discovered evidence must state facts constituting reasonable diligence.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

SHANKS v. SEAMONDS & CAMPBELL, 24 IOWA 131, 92 AM. DEC. 465

1. Guardian and Ward—Parent and Child—Father as Natural Guardian Has no Power to Sell Child's Realty.—A father has no power as *natural guardian* to sell or dispose of his child's real estate, even when ordered or attempted to be authorized so to do by the county court, pp. 132, 133.

Reaffirmed and qualified in Ringstead v. Hanson, 150 Iowa 327, 130 N. W. 146, 147, holding that independent of statute a father as *natural guardian* has no right or power to manage, sell or dispose of the real estate of his child: Holding, however, that under Secs. 2241 and 2243 of the Code of 1873, a father has the right to manage his child's real estate derived from either parent.

HENDERSHOTT v. PING, 24 IOWA 134

1. Judgment Lien on Real Estate—When Expires.—Under Sec. 4109 of the Code of 1860, a judgment is a lien upon the real estate of the judgment debtor for ten years from the date of its rendition, p. 136.

Reaffirmed in Albee v. Curtis & Morey, 77 Iowa 648, 42 N. W. 509.

Reaffirmed and extended in Lakin v. McCormick & Bro., 81 Iowa 547, 548, 46 N. W. 1062, holding further that—under the Code of 1873—a judgment creditor must levy upon and sell the real estate of the judgment debtor under execution, within ten years from the date of the judgment, or his rights under the judgment lien are lost.

Reaffirmed and extended in Hansen's Empire Fur Factory v. Teabout, 104 Iowa 369, 73 N. W. 877, holding that a judgment lien ceases ten years from the date of rendition, and cannot thereafter be revived by execution upon *scire facias*; that it must be so revived within the ten years.

Cross reference. See further on this question, annotations under Denegre v. Haun (13 Iowa 245), Vol. II, p. 144.

2. Judgment—Mortgage Lien on Land Not Merged in—When Mortgage Lien Discharged.—A mortgage lien on land continues until the debt it is given to secure is paid or discharged, and is not affected by any change of the evidence of the debt.

Such a mortgage lien is not merged in or affected by a decree of foreclosure of the mortgage, p. 137.

Reaffirmed in Shearer v. Mills, 35 Iowa 502.

Reaffirmed and explained in Stahl v. Roost, 34 Iowa 477; Jenks v. Shaw, 99 Iowa 610, 61 Am. St. Rep. 256, 68 N. W. 902, holding that when a debt secured by mortgage is discharged, or by operation of law can no longer be enforced, the lien of the mortgage ceases, but not before.

Distinguished in Tuttle v. Dewey, 44 Iowa 307-309, holding that the holder of a junior mortgage on land who is made defendant in an action for the foreclosure of a senior mortgage, can redeem after sale under the decree, by paying the amount bid thereat, with interest, within the time allowed therefor by statute—Code of 1873—although the senior mortgagee has bid in the property for less than his mortgage debt.

Special Cross reference. For other cases citing, sustaining and explaining the text, and many more on the question, see annotations under Packard v. Kingman (11 Iowa 219), Vol. I, p. 806.

3. Limitation of Actions—Action to Foreclose Mortgage on Land.—An action to foreclose a mortgage on land is within the meaning of Subdivision 4 of Sec. 2740 of the Code of 1860, and must be brought within ten years from the time the cause of action accrued, or it will be barred, p. 137.

Special cross reference. For cases citing the text, and others on the question, see annotations under Rule 1 of Newman v. De Lorimer (19 Iowa 244), Vol. II, p. 722.

4. Pleading—General Demurrer to Whole of Petition Some Part of Which is Good, to be Overruled.—A general demurrer to a petition, some part, or count, of which is good, must be overruled, p. 138.

Reaffirmed and extended in Holbert v. St. L., K. C. & N. Ry. Co., 38 Iowa 315, 316; Hine v. K. & D. M. R. R. Co., 42 Iowa 640, holding further that when an entire pleading is attacked by demurrer, it should be overruled, if any part of the pleading states a cause of action or defense.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

Cross references. See further on this question, annotations under Darr v. Lilley (11 Iowa 4); Jarvis v. Worwick (10 Iowa 29), Vol. I, pp. 759 and 637, respectively.

MANLEY v. WOLFE & CO., 24 IOWA 141

1. Actions—Venue—Action on Contract.—An action on a contract, or for breach thereof must—under Sec. 2798 of the Code of 1860—be brought in the county wherein the defendant or some one of them, if there are several, resides or reside, unless the contract expressly provides that it was to be performed by defendant or defendants in another county, in which case it may be brought in the latter, pp. 142, 143.

And see 147 Iowa 28, 125 N. W. 803.

Special Cross reference. For further cases citing, sustaining and explaining the text, and others, see annotations under Hunt v. Bratt (23 Iowa 171), ante. p. 92.

RENO v. TEAGARDEN, 24 IOWA 144

1. Judgment—Motion for New Trial—Subsequent Proceeding to Vacate, when Allowed.—The fact that a motion for a new trial based upon other grounds has previously been filed and overruled, does not prevent the unsuccessful party from instituting a proceeding under Sec. 3501 of the Code of 1860, to vacate the judgment for fraud practiced by the successful party in obtaining it, as provided by Subdivision 4 of Sec. 3499 of that Code, p. 149.

Distinguished in Dalhoff & Co. v. Keenan, 66 Iowa 681, 24 N. W. 274, holding that when, in the absence of fraud practiced by the successful party, [or other special ground given by statute?] the unsuccessful party fails to pursue his remedy at law to obtain a new trial, he cannot thereafter have relief in chancery.

(Note.—The facts of this distinguishing case do not come up to the text, and the case does not seem to affect the rule, or establish a new one.—Ed.)

WRIGHT v. HOWELL, 24 IOWA 150

1. Practice—Default—Failure to Answer Amended Petition—When Default Cannot be Entered.—In the absence of a rule of court, or an order requiring the defendant to answer an amended petition within a given time, and his failing to comply therewith, a default cannot be entered against him for his failure to so answer, pp. 152, 153.

Reaffirmed and extended in Rollins v. Cogshall, 29 Iowa 511, holding further that a default cannot be entered against a defendant for failure to file an amended answer upon a demurrer being sustained to his answer, until he has failed to so amend within the time prescribed or fixed by a general or special rule or order of the court.

PARSONS v. HOYT, 24 IOWA 154

1. Vendor and Purchaser—Lien of Vendor for Purchase Money under Mortgage or Trust Deed to Secure—Prior Judgment Creditor of Purchaser—Priority.—The lien of a vendor of land for the purchase price which is secured to him by mortgage or trust deed, is superior to the rights of a prior judgment creditor of the purchaser, p. 156.

Reaffirmed and varied in Thomas v. Hanson, 44 Iowa 651, 652, holding that the right of a widow to dower or distributive share in real estate of her deceased husband, is inferior to the rights of a vendor thereof under a mortgage to secure the purchase money.

Reaffirmed and varied in Thorpe Bros. v. Durbon, 45 Iowa 193, 194, holding that a vendor's lien for the purchase money of land under a mortgage given to secure it, is superior to the lien of a mechanic or materialman for materials furnished or labor performed

in the erection of a building thereon under a contract with the purchaser and while the vendor retained the legal title, although the labor was done or materials were furnished before the execution of the mortgage, but while the vendor held the legal title.

Distinguished in Gilman v. Dingeman, 49 Iowa 310, 311, holding that where a stranger to the contract pays purchase money of land to the vendor, and thereafter takes a mortgage thereon from the purchaser to secure it, the lien of the mortgage is inferior to the lien of a judgment rendered against the purchaser before his purchase.

Cross reference. See further on this question, annotations under Rule 1 of Porter v. City of Dubuque (20 Iowa 440), Vol. II, p. 840.

2. Lis Pendens—Neither Vendor Nor Purchaser Party to Action Involving Title to Land—When Rule Inapplicable.—A purchaser of land pending an action involving title thereto, who purchases from one not a party to the action and who purchases another title than that involved in the action, is not charged with notice of or bound by the proceedings, or a decree therein, p. 157.

Reaffirmed in Sprague v. White, 73 Iowa 674, 675. 35 N. W. 753; Noyes v. Crawford, 118 Iowa 18, 96 Am. St. Rep. 363, 91 N. W. 800, holding that the doctrine of *lis pendens* applies only in cases when, pending the action, a third person deals with reference to the subject-matter with a party to the action.

Cross references. See further on this question, annotations under Rule 4 of Cooley v. Brayton (16 Iowa 10), Vol. II, p. 394.

See, also, in this connection, Sec. 3543 of the Code of 1897.

MOORE, EXECUTOR, v. GORDON, EXECUTOR, 24 IOWA 158

1. Descent and Distribution—Interest of Heir or of Widow—When Vests.—The right to a distributive share vests in the person entitled, whether widow or next of kin, *instantly* upon the death of the intestate, and not from the time of distribution actually made: Distribution gives to the distributee no new title, but only ascertains the property to which the title attaches; and if the death of the distributee takes place before distribution actually made, his share goes to his legal representative, or legatee.

The right of the widow of a decedent to her distributive share is held by a title as high as that of the heir or next of kin, and, like his, is not personal, but transmissible, p. 162.

Reaffirmed as to first paragraph in In re Weaver's Estate, 110 Iowa, 332, 81 N. W. 607, holding further that when a person dies in another state owning personal property therein, the title thereto vests in his heir immediately upon his death; and the subsequent sale thereof by the personal representative, and his bringing the proceeds into this State for the purpose of distribution, or for any other purpose, will not render such proceeds liable to an inheritance tax under Sec. 1467, of the Code of 1897.

Reaffirmed and extended as to first paragraph in Christie, Adm'r, v. C. R. I. & P. Ry. Co., 104 Iowa, 709-711, 74 N. W. 697, holding further that a full settlement by the sole heirs of a decedent with one who caused the latter's death by wrongful act or negligence, bars an action by the administrator to recover damages for his death.

Reaffirmed and extended as to first paragraph in Ferry v. Campbell, 110 Iowa 296, 50 L. R. A. 92, 81 N. W. 604, holding further that Chap. 28, Acts of Twenty-sixth General Assembly, and the re-enactment thereof in the Code of 1897, relating to inheritance tax, is unconstitutional because it fails to provide for notice to the heirs, etc., by which the amount of the tax was to be ascertained, and thus attempted to interfere with vested rights without notice—But holding, also, that Chap. 37, Acts of Twenty-seventh General Assembly cures the previous Act.

Reaffirmed and extended as to first paragraph in Herriott, State Treasurer v. Potter, Adm'r., 115 Iowa 650, 651, 89 N. W. 92, holding further that the title to the real estate of a decedent descends to his heirs *eo instanti* upon his death, subject to the right of the personal representative to resort thereto to pay debts as provided by law: Hence holding that when a person died after Chap. 28, of the Acts of the Twenty-sixth General Assembly relating to inheritance tax was decided unconstitutional, and before the passage of Chap. 37, Acts of Twenty-seventh General Assembly, amending and curing the previous law, the real estate of which the decedent died seized was not subject to an inheritance tax.

Reaffirmed and extended as to first paragraph in Douglas, Adm'r v. Albrecht, 130 Iowa 135, 136, 106 N. W. 356, holding further that when there are no creditors of a decedent, and the heirs who are adults agree to a settlement and distribution of his estate in a specified manner, an administrator of the decedent who is thereafter appointed cannot demand the surrender to him of the items of personal estate so distributed, and, upon refusal to comply with such demand, maintain an action for conversion thereof: That in such case the agreement of settlement and distribution avoids the necessity for the appointment of an administrator.

Reaffirmed and qualified as to first paragraph in In re Wiltsey's Estate, 122 Iowa 428, 98 N. W. 296, holding that when a testator dies bequeathing personal property only by his will, and an heir enters a contest, or files objections to the probate of the instrument, pending which contest the heir dies leaving a will, the personal representative of the heir may be substituted as party and prosecute the contest of the first will, or the legatee of the heir is entitled to be so substituted upon the last will being admitted to probate.

Reaffirmed and qualified as to first paragraph in Blackman, Adm'r, and Reese, Adm'r, v. Baxter, Reed & Co., and Macomber, 125 Iowa 120, 121, 127, 2 Am. & Eng. Ann. Cas. 707, 70 L. R. A. 250, 100 N. W.

76, holding that the personal property of a decedent and the heirs' interest therein is burdened by the claims of creditors, and, until these have been discharged he is neither entitled to distribution nor to exercise any control over the property: Holding, therefore, that an administrator of a decedent whose estate is insolvent may attack the validity of a chattel mortgage executed by the decedent before his death and while insolvent, which mortgage is unrecorded and void under Sec. 2906 of the Code of 1897, as to existing creditors; the action of the administrator in such case being as trustee and for the benefit of decedent's creditors.

Distinguished in Bowen v. Evans et al, Ex'rs., 70 Iowa 370, 30 N. W. 639, holding that a general legacy does not operate as a payment at the date of the death of testator of a debt due by the legatee to the latter; and that such a debt evidenced by note should draw interest until such time as the executors may lawfully pay the legacy, or in other words till the legacy out of which the debt is to be paid, becomes due.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

KITSMILLER v. KITCHEN, 24 IOWA 163

1. Actions—Original Notice Fatally Defective—Judgment Void, Collateral Attack.—When an original notice is so defective as to amount to *no notice*, a judgment rendered thereon is void, and may be collaterally attacked. Such an original notice is one which fails to inform the defendant as to the place where and the time when he must appear and defend the action, pp. 165, 166.

Reaffirmed and explained in De Tar v. Boone County, 34 Iowa 491, holding that *defective* notice is not sufficient to allow the enjoining or setting aside a judgment, but that in order to justify such proceedings, the original notice must amount to *no notice*.

Reaffirmed and explained in Lyon v. Vanatta, 35 Iowa 525-528, holding that when there is such a defective original notice as to be equivalent to *no notice*, the judgment and all proceedings are void, whether assailed directly or collaterally: Holding, also, that such a notice is one which warns defendant to appear and answer at a time when the term of court is not in session and before it commences.

Reaffirmed and explained in Jones & Magee Lumber Co. v. Boggs, 63 Iowa 591, 19 N. W. 678, holding that an original notice must substantially conform to the statute; and if it fails to name the term at which the defendant is to appear and answer, a judgment rendered thereon, in the absence of a voluntary appearance by defendant, is a nullity.

Reaffirmed and explained in Cummings v. Landes, 140 Iowa 84, 117 N. W. 24, holding that when an original notice is so wanting

in the requirements of the statute as to constitute *no notice* when served, the court is without jurisdiction even to appoint a guardian *ad litem*; and that service of an original notice after the date fixed for the defendant to appear and answer, is *no notice*, and all proceedings thereunder are void.

Reaffirmed and extended in Hoitt, and Merchants' Sav. Bank v. Skinner, 99 Iowa 363-366, 68 N. W. 789, holding that when defendant is served with a copy of an original notice which is not signed by plaintiff's attorney, and the copy does not show that the original was so signed, and the original is not read to him at the time of the service, it amounts to *no notice*, and a judgment thereon by default is void and will be set aside upon defendant's motion, without his complying with Sec. 4078 of McClain's Code (Sec. 3790 of the Code of 1897), in reference to setting aside defaults.

Reaffirmed and varied in Fernekes & Bros. v. Case, 75 Iowa 153, 154, 39 N. W. 239, holding that where an original notice warns the defendant to appear at a certain term of court and gives the month thereof, but incorrectly states the date of the first day of the term on which he is to appear as the 30th day of that month, when, in fact, the court commenced on the 23rd day thereof, such notice amounts to *no notice*, and does not arrest the operation of the statute of limitations.

Reaffirmed and varied in Spencer v. Burns, 114 Iowa 127, 128, 86 N. W. 210, holding that when defendant is served with notice by a copy being left at his usual place of residence with one *who is not a member of his family*, it amounts to *no notice*, a judgment by default entered thereon is void, and will be set aside upon defendant's motion without his complying with Sec. 3790 of the Code of 1897, with reference to setting aside defaults.

Reaffirmed and varied in Thornily v. Prentice, 121 Iowa 92, 93, 100 Am. St. Rep. 317, 96 N. W. 729, holding that a return of a sheriff which states that a copy of the original notice was left with the son of defendant, unsupported by any allegation that it was left with a member of his family, or at his usual place of residence, or that he was not to be found in the county of his residence, does not show even a defective or informal service, but shows no service, gives the court no jurisdiction, and a judgment rendered thereon is void, and may be either directly or collaterally attacked.

Reaffirmed and varied in Beck. v. Vaughn, 134 Iowa 334, 335, 111 N. W. 995, holding that a notice for a temporary writ of injunction before a judge in vacation which fails to state the name of the judge to whom the application therefor will be made, and does not state the place where he will be found, other than naming the city generally where the application will be made, confers no jurisdiction, and all proceedings thereunder are void, and may be assailed and canceled in any court, either directly or collaterally.

Cited in Salladay v. Bainhill, 29 Iowa 556, the court holding that in an action upon a judgment rendered in a justice's court in this State, the defendant may show want of notice to him in the first action, by extrinsic evidence contradicting the judgment which recites that due notice was had upon him.

Cited Koehler & Lange v. Hill, 60 Iowa 632, 15 N. W. 623, not in point.

Distinguished in Bond v. Epley, 48 Iowa 606, holding that an original notice of an action in the district court which notifies the defendant to appear and defend at a given time in the district court of a *certain county*, is sufficient under the Code of 1873, without setting out the city or town in which the court is to be held.

Cross references. See further on this question, annotations under Rule 2 of Bonsall v. Isett (14 Iowa 309); Boker v. Chapline (12 Iowa 204), Vol. II, pp. 242 and 33, respectively. See, also, annotations under Rule 2 of Moomey v. Maas (22 Iowa 380), ante. p. 43.

HALLAM v. TODHUNTER, 24 IOWA 166

1. Fraud and False Representations Inducing Contract—Action for Damages—Proof Required.—In an action for damages for false and fraudulent representations by a vendor as to the quantity of land sold to plaintiff, the plaintiff must prove that the representations by defendant (vendor) were false and so known to him at the time he made them, and that he, plaintiff, did not know them to be untrue, but relied on their truth, pp. 168, 169.

Reaffirmed and explained in Allison v. Jack, 76 Iowa 208, 40 N. W. 812, holding that in an action at law for damages on account of false and fraudulent representations inducing a contract, it is not sufficient for the plaintiff to show that the defendant had reasonable cause to believe that the statements were untrue at the time he made them; but that they must in fact have been false and known to be so by the defendant at the time he made them, in order to justify a recovery by plaintiff in such an action.

Reaffirmed and explained in Phelps v. James, 79 Iowa 265, 41 Am. St. Rep. 497, 44 N. W. 543, holding that to render one liable in damages in an action at law by reason of false representations as to the character and condition of land inducing its purchase by plaintiff, the plaintiff must prove that the defendant's representations were false and so known to him at the time he made them.

Cited in First Nat'l Bank of Cedar Rapids v. Hurford & Bro., 29 Iowa 586, the court holding that in the absence of proof, fraud will never be presumed; and that the party alleging it must prove it as any other material fact.

Distinguished and narrowed in Sweezey v. Collins, 36 Iowa 591, holding—as does the present case in argument—that equity will grant

relief where a false representation inducing a contract is made by a party who does not know it to be true—The equity jurisdiction thus arising as in the case of a mutual mistake.

Special Cross reference. For further cases citing, sustaining, explaining and qualifying the text, and many others on the question, see annotations under Rule 1 of *Holmes v. Clark* (10 Iowa 423), Vol. I, p. 719.

2. False Representations Inducing Purchase of Land—Action for Damages—Measure of.—In an action at law for damages for false representations of a vendor of land as to the quantity thereof, the measure of damages is the contract price, with legal interest thereon per acre for the number of acres that the actual quantity of the land sold differs from the quantity it was represented to contain, p. 169.

Reaffirmed in *Howes v. Axtell*, 74 Iowa 402, 37 N. W. 976.

Reaffirmed and extended in *Latham v. Shipley*, 86 Iowa 549, 53 N. W. 343, holding further that in an action at law to recover damages for breach of warranty, or for false representations, by the seller of personal property as to its quality, the measure of damages is the difference in value between the property in its actual condition at the time of sale, and its value if it had been as represented or warranted: And this rule applies when the buyer sets up such damages as a counter claim, when sued by the seller for the purchase price.

Reaffirmed and qualified in *Fagan v. Hook*, 134 Iowa 391, 392, 111 N. W. 982, holding that upon the failure of a vendor to make a good title to land as provided by his contract of sale thereof, the purchaser has the right to affirm the continued existence of the contract and maintain an action for damages, or, at his election, he can rescind the contract and demand that defendant place him in *statu quo* by restoring to him the money, if any, which he paid and the property which he had delivered in fulfillment of the agreement on his part.

Cross reference. See further on this question, annotations under Rule 1 of *Gates v. Reynolds* (13 Iowa 1), Vol. II, p. 107.

WILLIAMSON v. WESTERN STAGE CO., 24 IOWA 171

1. Damages—Punitive or Exemplary, When Allowed.—In an action for damages, punitive or exemplary damages can only be awarded when there is proof of fraud, malice, gross negligence, or oppression by defendant, p. 171.

Reaffirmed and explained in *Davis v. Seeley*, 91 Iowa 586, 51 Am. St. Rep. 356, 60 N. W. 184, holding that where malice is charged, and the jury find it established by the evidence, they are warranted, under the instructions of the court, in allowing exemplary damages; and that it is not necessary that such damages be claimed and prayed for in the petition.

Reaffirmed and qualified in Jeffries v. Snyder, 110 Iowa 367, 81 N. W. 681, holding that exemplary damages may be recovered when given by statute as accompanying actual damages, although fraud, etc., as set out in the text be not proved.

(Note.—See further, Thill v. Pohlman, 76 Iowa 638, 41 N. W. 385; Irwin v. Yeager, 74 Iowa 175, 37 N. W. 136; Gustafson v. Wind, 62 Iowa 284, 17 N. W. 523; Jones v. Marshall, 56 Iowa 739, 10 N. W. 264; Johnson v. C. R. I. & P. Ry. Co., 51 Iowa 25, some important cases sustaining and explaining, but not citing the text.—Ed.)

CARLETON v. BYINGTON, 24 IOWA 172

(Cases arising out of same transaction, 17 Iowa 579; 18 Iowa 482.)

1. Pleading—When Reply not Allowed—Proof Under Issue Made by Operation of Law—Proof of Res Adjudicata to Defense in Answer.—Under Sec. 2895 of the Code of 1860, a reply is not allowed except when an answer contains a counterclaim, set-off or cross demand. All other allegations in an answer are denied by operation of law, and the plaintiff may introduce any proof in avoidance thereof under the issue made by law.

Under this rule the plaintiff has a right to prove matters constituting *res adjudicata* to matters set up in the answer, without filing an amended petition, or a reply specially setting up his plea, p. 175.

Reaffirmed as to first paragraph in Barger v. Farris & Wilmer, 34 Iowa 230, 231; Corbin v. Beebee, 36 Iowa 340.

Cited in McCready v. Sexton & Son, 29 Iowa 403 (dissenting opinion), 4 Am. Rep. 214, the majority court opinion turning on other questions.

(Note.—There are many other cases sustaining, but not citing the first paragraph of the text.—Ed.)

Cross reference. See further on this question, Sec. 3576 of the Code of 1897.

2. Mortgage on Land—Interest Due Semi-Annually—Action to Foreclose before Principal Due—Judgment.—An action to foreclose a mortgage on land may be maintained before the principal is due, upon default in payment of any interest due semi-annually, and in such case the petition may claim and decree of foreclosure may be entered for the principal, and the interest due; rebating—under Sec. 3667 of the Code of 1860—the interest to accrue between the time of sale and the maturity of the note or debt secured, pp. 175, 176.

Reaffirmed in Stafford v. Maus, 38 Iowa 140.

KRAPFEL v. PFIFFNER, 24 IOWA 176

1. Appeal in Chancery Action—De Novo Trial on—When not Allowed.—Upon an appeal in a chancery action tried according to the first method prescribed by Secs. 2999 and 3000 of the Code of

1860—all evidence in writing—a trial *de novo* will not be had, when the record does not contain all the evidence adduced below, p. 178.

Reaffirmed in *Howe & Co. v. Jones*, 66 Iowa 160, 23 N. W. 378, under the Code of 1873.

Cross references. See further on this question, annotations under Rule 2 of *Blake v. Blake* (13 Iowa 40), Vol. II, p. 115. See further, also, Sec. 3652 of the Code of 1897.

2. Appeal in Chancery Action Tried by Second Method—Review.—Upon an appeal in a chancery action tried according to the second method prescribed by Secs. 2999 and 3000 of the Code of 1860, only legal errors properly presented as in ordinary actions will be reviewed by the Supreme Court, p. 178.

Special Cross reference. For cases citing and sustaining the text, and others, see annotations under Rule 3 of *Cole v. Cole* (23 Iowa 433) ante. p. 120.

Cross reference. See further Sec. 3652 of the Code of 1897.

OAKS *v.* HARRISON, 24 IOWA 179

1. Fraud—Burden of Proof—Sufficiency of Proof.—The burden of proof is on the party alleging fraud or fraudulent representations to prove his averments thereof by sufficient proof. Every transaction is presumed to be fair and honest, and when the proof is equally balanced, or in equipoise, the party alleging fraud must fail, pp. 179, 180.

Reaffirmed in *First Nat'l Bank of Cedar Rapids v. Hurford & Bro.*, 29 Iowa 586; *Gibbs v. Farmers' & Merchants' State Bank*, and *Butterfield*, 123 Iowa 744, 99 N. W. 706.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

2. False Representations—Full Knowledge of Party Suing.—Where a party suing for false representations as to the situation and condition of land inducing him to enter into a contract for its purchase, or of exchange of other land therefor, with full knowledge of the situation and condition represented, accepts the benefits or consideration, he thereby waives the fraud, if any, p. 180.

Reaffirmed and explained in *McNally v. Shobe*, 22 Iowa 51, holding that where a purchaser after examining land bought, gives his note for the purchase price, he thereby waives any fraud or false representations as to its location, character, quality or condition.

CLEMMER & DUNN *v.* COOPER, 24 IOWA 185, 95 AM. DEC. 720

1. Foreign Judgment—Faith and Credit to be Given to in Action on in This State.—Where a foreign judgment is sought to be enforced in this State, and the proof shows that it is entitled to the faith

and credit of a judgment, according to the laws, practice and usage of the state where it was rendered, it will be given the same effect in the court wherein it is sued on in this State, p. 187.

Reaffirmed in F. Miller Brew. Co. v. Capital Ins. Co., 111 Iowa 600, 82 Am. St. Rep. 529, 82 N. W. 1027.

Reaffirmed and qualified in Melhop & Kingman v. Doane & Co., 31 Iowa 400, 401, 7 Am. Rep. 147, holding that a judgment of another state, where the jurisdiction properly appears upon the record, is entitled to the same faith and credit in this state as it is entitled to in the state where rendered.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

PARKS v. IOWA CENTRAL R. R. CO., 24 IOWA 188

1. Swamp Lands—Appropriation for Construction of Railroad—Submission to Vote of People—Contract Need Not be Submitted.—Under Sec. 986 of the Code of 1860, as amended by Chap. 77, Acts of 1862, swamp lands of a county, or their proceeds may be appropriated by a vote of the people to a railroad company to aid in the construction of its road; and the contract with the company need not be submitted to the people for their approval and ratification with the question of the appropriation, p. 189.

Cited in Taylor County v. Melendy, 55 Iowa 401, 7 N. W. 672, the court holding that where, after the swamp lands in this present case were appropriated to the railroad company to aid in the construction of the road, the company failed to so construct it and abandoned the road, the fee simple title to the lands remained in the county as against the company, and grantees from it under quit-claim deeds.

(Note.—See further on this question, Barrett v. Brooks, 21 Iowa 144, not citing the text.—Ed.)

JONES v. TIFFIN, TREASURER, 24 IOWA 190

1. Taxation and Revenue—Assessment—Change of by Clerk of Board of Supervisors, when Allowed.—Under Sec. 747 of the Code of 1860, the clerk of the board of supervisors may correct any mistakes or errors in the valuation of property in the assessment or tax books at any time he discovers them; but this does not allow him to change the assessment valuation of a tax payer's property because not fair and reasonable, when it is not shown that the assessment or valuation changed was the result of mistake or error, pp. 191, 192.

Cited with approval in Hill v. Wolfe, 28 Iowa 583, not in point, but upon analogy.

Cited in Conway v. Younkin, 28 Iowa 297, the court holding that the omission of the assessor after determining that certain property

belonged to a married woman, to write her name with that of her husband, or to assess the property to her alone, is an error that may properly be corrected by the clerk of the board of supervisors, under Sec. 747 of the Code of 1860.

2. Taxation and Revenue—Power of Board of Supervisors to Ratify Unauthorized Act of Clerk.—The board of supervisors may have power to adopt and ratify the unauthorized act of its clerk in equalizing taxes; but the point is not herein decided, p. 192.

Cited in Ridley v. Dougherty, 85 Iowa 421, 52 N. W. 351, not in point.

WALTERS v. STEAMBOAT MOLLIE DOZIER, 24 IOWA 192, 95 AM. DEC. 722

1. Boats and Vessels—Action Against—Chapter 148 of Code of 1860—To What Extent Unconstitutional.—Chap. 148 of the Code of 1860 is unconstitutional in so far as it attempts to confer jurisdiction of state courts of actions *in rem* against boats or vessels for a cause of action of exclusive jurisdiction in courts of admiralty, p. 196.

Cited in City of Keokuk v. Keokuk Northern Line Packet Co., 45 Iowa 211, the court holding that statutes which are partly in conflict with the Constitution will be held void no farther than as to those parts which are unconstitutional; and that provisions which are within the limits of legislative authority will be enforced.

2. Actions—Want of Jurisdiction—When Objection May be Made.—An objection that the court has no jurisdiction of a cause of action may be made at any stage of the proceedings, and even for the first time upon appeal, pp. 199, 200.

Reaffirmed in McMeans v. Cameron, 51 Iowa 693; Cerro Gordo County v. Rice County, 59 Iowa 486, 13 N. W. 645; Wedgewood & Co. v. Parr, 112 Iowa 517, 84 N. W. 529; Porter v. Welsh, 117 Iowa 146, 90 N. W. 582, holding that consent does not waive want of jurisdiction of the subject-matter, and such an objection may be raised at any stage of the proceedings, and even upon appeal.

Reaffirmed and explained in Danforth v. Thompson, 34 Iowa 245, holding that consent will not confer jurisdiction when the court does not by the law, have jurisdiction of the *subject-matter*.

Reaffirmed and extended in State v. Belvel, 89 Iowa 408, 27 L. R. A. 846, 56 N. W. 546, holding further that want of jurisdiction of the subject-matter cannot be waived, but will be considered at any time when it comes to the knowledge of the court, even though not urged by either party: Holding further, however, that when a grand jury is composed of five when it should be composed of seven persons, or *vice versa*, under Chap. 42, Acts of Twenty-first General Assembly, that an indictment returned by it is good, when the accused does not object thereto on such ground before pleading to it.

Distinguished in Roland v. Brock, 29 Iowa 285, 286, holding that when the general jurisdiction of the court is unquestioned, but it is claimed that a fact is pleaded or exists which, if true, would oust it of jurisdiction, any alleged error of the court in deciding whether it is pleaded or exists, must be preserved and shown of record, like any other error.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

CARPENTER v. SMITH, 24 IOWA 200

1. Husband and Wife—Void Marriage—Property Rights not Conferred by.—A marriage between parties when one of them has a living, undivorced husband or wife is void *ab initio*, and confers no property rights upon either of the parties, pp. 202, 203.

Reaffirmed in Drummond v. Irish, 52 Iowa 42, 43, 2 N. W. 623.

LOVE v. CHERRY, 24 IOWA 204

1. Domicile and Residence—Difference Between—Actions—Substituted Service of Original Notice.—A man may have a residence in one place and his domicile in another. A domicile once established is presumed to continue until it is shown to have been abandoned and another permanently acquired.

So where a person who has a permanent *residence and domicile* in this state, leaves it for the purpose of making some visits and transacting some business, but with the intention of returning in a convenient but uncertain time to his domicile herein, and thereafter becomes a *resident* of another state *for the purpose of qualifying as a personal representative* in the latter state, a substituted service of an original notice by leaving a copy thereof at his usual place of residence, etc., (his domicile in this state), is sufficient upon collateral attack of a judgment rendered thereon by a court of this state, pp. 208, 209.

Reaffirmed as to first paragraph in Savage v. Scott, 45 Iowa 133, holding that when a man has a residence in this state, is engaged in business, votes at an election in this state, and has an intention of making it his permanent home, the statute of limitation of this state runs against a claim against him while he holds his residence here.

Reaffirmed and explained in Church v. Crossman, 49 Iowa 448, a case involving the validity of a service of summons or notice, holding that a mere intention to remove from an established residence to another place, and the shipping of part of his goods to the latter, does not change a person's residence.

Reaffirmed and explained in Fitzgerald v. Arel, 63 Iowa 106-108, 50 Am. Rep. 733, 16 N. W. 713, holding that in determining whether or not a justice's court has jurisdiction of a cause of action under Sec.

3507 of the Code of 1873, the question is whether or not the defendant is an *actual resident* of the county, and not whether he has his domicile therein; that "residence" means the place of dwelling, whether permanent or temporary, whereas "domicile" means a fixed, permanent residence to which, when absent, a party has an intention to return.

Reaffirmed and explained in Botna Valley State Bank v. Silver City Bank, 87 Iowa 482, 54 N. W. 473, holding that—on a question of the venue of an action and validity of service of an original notice—where a residence is once established, it continues until there is an actual change of habitation with intention to make a new residence; and that residence once acquired is presumed to continue until there is satisfactory evidence showing that it has been abandoned.

Reaffirmed and explained as to first paragraph in Cohen v. Daniels, 25 Iowa 90, 91, holding—on a question of the venue of an action—that in determining the fact of the residence of the defendant, his intention and acts must be considered together and that they must agree in order to fix residence; and that a person changes his residence by moving to another place without an intention of returning: Holding further that residence and domicile are not convertible terms; and that a person may have a residence in one place and a domicile in another.

Reaffirmed and varied in Jenkins v. Clark, 71 Iowa 555, 32 N. W. 505, holding, also, that the domicile of the parent is the domicile of his child; and that the circuit court of the county of the parent's domicile at the time of his death, has jurisdiction to appoint a guardian of the person of the child, although the child be without its jurisdiction at the time it makes the appointment.

Reaffirmed and qualified in Ludlow, Clark & Co. v. Szold, 90 Iowa 179, 180, 57 N. W. 678, holding that legal residence as distinguished from a mere temporary actual residence, is the residence contemplated in Sec. 2580 of the Code of 1873, relating to the place of bringing actions aided by attachment: That the intention of the party and his acts, are to be considered, in determining the question; and they must concur, in order to fix the fact of residence.

Reaffirmed and qualified in Des Moines Sav. Bank v. Kennedy, 142 Iowa 278, 120 N. W. 744, holding that in order—under Sec. 3501 of the Code of 1897—to justify service of notice in defendant's absence from the county or state, by leaving a copy with a member of his family, he must be an *actual resident* at the time: That a party may be a non-resident, although he stays a considerable portion of his time with relatives in this state.

Citing with approval in Mann v. Taylor, 78 Iowa 364, 43 N. W. 222 (concurring opinion), the majority court opinion holding that a mere *intention* by defendant to leave the state, does not change his residence or make him a non-resident.

Cited in Galvin v. Daily, 109 Iowa 337, 338, 80 N. W. 422, the court holding that where at the time a wife is temporarily separated from her husband without her fault, and is living in a distant part of the state from him, she is sued on notes which she did not sign or authorize to be signed and which were without consideration, and service of original notice is made on her by leaving a copy with her husband, she may set a judgment rendered thereon aside on the ground of "unavoidable casualty or misfortune" under Sub divis. 5 of Sec. 4091 of the Code of 1897.

Cited in In re Benton, 92 Iowa 205, 54 Am. St. Rep. 546, 60 N. W. 615, the court holding that where infant children reside with their grand father, their parents being both dead, the domicile of the grand parent is their domicile, and gives the proper court thereof jurisdiction to appoint a statutory guardian for them.

Distinguished in Schlawig v. De Peyster, 83 Iowa 325, 326, 32 Am. St. Rep. 308, 49 N. W. 844, holding that actual residence, with the purpose and intent that it is legal and shall be permanent, fixes the legal residence contemplated by the statute providing for service of original notice of an action by a copy delivered to a member of the defendant's family at his usual place of residence without regard to the place of residence of his family: Hence holding that where a party moves to another state with an intention to make it his permanent home, engages in business, votes, and sits upon juries there, but leaves his wife and family in this state intending to remove them as soon as he could do so, that a service of original notice on him in this state by leaving a copy thereof with his wife at the residence of his family herein, confers no jurisdiction of his person, and a judgment rendered thereon is void.

Cross references. See further on this question, annotations under Rule 1 of State v. Minnick (15 Iowa 123), Vol. II, p. 314; Rule 4 of State v. Groome (10 Iowa 308), Vol. I, p. 690.

2. Execution Sale—Sale of Several Lots Under—Presumption of Legal Sale of—Sale of Lots in Gross—Validity as to Innocent Third Persons.—Where several lots of land are sold under execution, the presumption is that the sheriff did his duty, and that they were sold separately; nor does the statement in the sheriff's return that the lots were sold for a certain sum, overcome this presumption, when the return does not state whether they were sold separately or together.

Although a sale of several lots under execution, together and for a gross sum to the execution plaintiff will be set aside, yet it is questionable whether such a sale can, after the period of redemption has expired and the sheriff's deed is executed and delivered, be made available to defeat a title in a third party, which is otherwise regular, p. 210.

Reaffirmed and explained in Eggers v. Redwood, 50 Iowa 290, 291, holding that the presumption is that the sheriff did his duty in selling homestead and other land in a lump and for a gross sum under execution; and that in an action by the execution debtor to set such sale aside, he must aver and prove that before so selling, the sheriff did not offer the land other than the homestead for sale first, and then, upon receiving no bid, or not enough to satisfy the execution, so sold the property in a lump.

Reaffirmed and explained as to second paragraph in Williams v. Allison, 33 Iowa 289, 290, holding that a sale of several lots in gross under execution, for a lump sum, to the execution creditor will be set aside upon complaint of the execution debtor at any time, as to the lots still held by such creditor; that if such a sale is attacked diligently and without laches, it is voidable even as to part of the property which has passed into the hands of a *bona fide* third person for value; but that such a sale, though voidable, will not be set aside after a great lapse of time, when it will work injustice to third persons.

Reaffirmed and extended in Burmeister v. Dewey, 27 Iowa 471-474, holding further that where a sheriff offers several parcels of land separately at a sale under execution, and receiving no bids, proceeds to sell the whole for a lump sum, the sale will not be set aside after a lapse of nine years, in the absence of a showing that the execution debtor was thereby prejudiced, nor even then as against third persons, after so long a time; and that this rule applies although part of the land so sold was homestead.

Reaffirmed and extended in Foley v. Kane, 53 Iowa 66, 67, 4 N. W. 823, holding further that the recital in a sheriff's deed to several parcels of land that they were sold to the grantee at an execution sale for a certain mentioned gross sum, does not establish the fact that such lands were sold together for a gross sum: Holding further that a sale of several parcels of land in a lump and for a gross sum under execution, does not render such sale or deed made thereunder *void* in an action at law.

COOLEGE v. MAHASKA COUNTY, 24 IOWA 211

1. Counties—Support of Poor by—Liability Statutory.—Statute to be Pursued.—The obligation or duty of the county to support the Poor is statutory, and to render it liable the case must fall within, and the liability be created pursuant to, and in the manner prescribed by the statute, p. 213.

Reaffirmed in Mansfield v. Sac County, 60 Iowa 15, 14 N. W. 74.

Unreported citations, 133 N. W. 134; 133 N. W. 378.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

2. Counties—Support of Poor by—Medical Services to Poor—Power of Township Trustees.—Under Secs. 1387 and 1388 of the

Code of 1860; the township trustees may bind the county for medical services rendered at their instance to poor sick persons in their township, p. 213.

Reaffirmed and extended in Mansfield v. Sac County, 60 Iowa 15, 14 N. W. 74, holding further that— under the Code of 1873—when township trustees authorize aid to be furnished to a poor person, it may be continued, if done in good faith, until the board of supervisors order otherwise, the county being liable therefor; but that if, in such case, the trustees fail to report their action to the supervisors they are liable to the county for the damages from continuance of aid to a person who is not properly entitled to it.

Cited in Armstrong v. Tama County, 34 Iowa 313, the court holding that when an ordinary claim against a county (in this case medicines furnished a pauper upon the order of the proper district township trustees) is refused payment by the county board of supervisors, action may be commenced thereon, and the creditor is not required to appeal from the action of the board.

Cross reference. See further in this connection, annotations under Rule 2 of White v. Polk County (17 Iowa 413), Vol. II, p. 552.

BUCKWALTER v. CRAIG, 24 IOWA 215

1. Practice—Nunc Pro Tunc Order—Power of Court to Make After Appeal.—The trial court may at any time upon motion, proper notice of which is given, enter an order *nunc pro tunc* correcting a palpable omission or evident mistake in the record: And this he may do after final decree or judgment and appeal to the Supreme Court; and in this latter case the record upon appeal may be corrected by filing the *nunc pro tunc* order therein, pp. 216, 217.

Cited in Day v. Goodwin, 104 Iowa 382, 65 Am. St. Rep. 465, 73 N. W. 866, the court holding that the right of a party to a *nunc pro tunc* order is only to have the record show *what the court actually did* in the case, and that it is immaterial in passing upon this right whether the proceedings in the case were regular or irregular, valid or invalid: Hence holding that where a decree was prepared and signed by the judge, and handed to the clerk who filed, but failed to record it, an order may later be made recording it as of the date it should have been done.

(Note.—See further sustaining and explaining, but not citing the text, Shelly v. Smith, 50 Iowa 543; Fuller v. Stebbins, 49 Iowa 376; Tracy v. Beeson, 47 Iowa 155.—Ed.)

SHAWHAN v. LOFFER, 24 IOWA 217

1. Actions—Defective or Imperfect Original Notice or Service—Collateral Attack of Judgment.—If it appears that there was a notice in an action, although it was defective, or that the service thereof

was imperfect, and that either or both failed to comply strictly with the statute, and that the court determined the sufficiency thereof, which is shown upon the record, the judgment rendered thereon will not be held void upon collateral attack.

If such determination be erroneous, it should be corrected by appeal, and cannot be reserved as a ground of attack upon the judgment in a collateral proceeding, p. 226.

Reaffirmed in Farmers' Ins. Co. v. Highsmith, 44 Iowa 333; Bunce v. Bunce, 59 Iowa 535, 13 N. W. 705; Stanley v. Noble, 59 Iowa 669, 670; 13 N. W. 840; Hamiel v. Donnelly, 75 Iowa 95, 96, 39 N. W. 211; Schneitman v. Noble, 75 Iowa 122, 123, 9 Am. St. Rep. 467, 39 N. W. 325; Rotch v. Humbolt College, 89 Iowa 482, 56 N. W. 659.

Reaffirmed and explained in Shea v. Quintin, 30 Iowa 59, holding that a judgment will not be set aside as void and its collection enjoined in an action in equity therefor, because of defective or insufficient notice or its service, but that in order for such relief to be obtained there must be an entire want of notice; that a judgment rendered upon defective or insufficient notice or in its service, must be corrected on motion or appeal: Hence holding that such equitable relief will not be granted against a judgment entered by default upon a notice not served the required length of time.

Reaffirmed and explained in Tharp v. Brennahan, 41 Iowa 254; Myers v. Davis, 47 Iowa 330; Lees v. Wetmore, 58 Iowa 178, 12 N. W. 241; Baker v. Jamison, 73 Iowa 701, 36 N. W. 650, holding that where a court has jurisdiction of the subject-matter, errors in its decisions upon the sufficiency of original notice or of service thereof, or any other rulings in the action or proceeding will not be available upon collateral attack.

Reaffirmed and extended in Dougherty v. McManus, 36 Iowa 659, holding further that a judgment rendered by default in a justice's court upon an insufficient notice must be corrected by writ of error or by appeal as provided by law, and will not be set aside or enjoined in equity.

Reaffirmed and extended in Irions v. Keystone Mfg. Co., 61 Iowa 407, 16 N. W. 350, holding further that a judgment entered by default upon a defective notice or return will not be set aside in equity as void.

Reaffirmed and extended in Fanning v. Krapfl, 68 Iowa 248, 249, 26 N. W. 135, holding further that when the record shows that an affidavit as to service of notice by publication was filed, and thereafter a judgment was entered, that the subsequent entry of the judgment necessarily involved the sufficiency of the affidavit, and judgment cannot be collaterally attacked for insufficiency of the affidavit.

Reaffirmed and qualified in Lyon v. Vanatta, 35 Iowa 525-529, holding that when there is such a defective original notice as to be

equivalent to *no notice*, the judgment and all proceedings are void, whether assailed directly or collaterally: Holding, also, that such a notice is one which warns defendant to appear and answer at a time when the term of court is not in session and before it commences.

Reaffirmed and qualified in Thornily v. Prentice, 121 Iowa 92, 93, 100 Am. St. Rep. 317, 96 N. W. 728, holding that a return of a sheriff which states that a copy of the original notice was left with the son of defendant, unsupported by any allegation that it was left with any member of his family, or at his usual place of residence, or that he was not to be found in the county of his residence, does not show even a defective or informal service, but *no service* and gives the court no jurisdiction over him, and a judgment rendered thereon is void and may be either directly or collaterally attacked.

Cited in Read v. Howe, 39 Iowa 559, 560, the court holding that when a court has jurisdiction of the subject-matter of an action or proceeding, his ruling on the sufficiency of the petition, if erroneous, must be corrected by a writ of error or by appeal, unless the allegations of the petition are so defective as to confer no jurisdiction.

Cited in Koehler & Lange v. Hill, 60 Iowa 564, (cited in dissenting opinion, 577, 578), 14 N. W. 749, 755, 756, the majority court holding that when a subsequent General Assembly decides and enacts that a prior one did not do that which the records of the prior shows was done, such subsequent determination is void and binding upon no one.

Distinguished in Goode v. Norley, 28 Iowa 195-200; Rankin v. Miller, 43 Iowa 21, (cited in dissenting opinion, 209), holding that probate proceedings to sell real estate of a decedent, where the heirs and persons having an interest therein are not served with notice, are void *ab initio*.—But see Mullin v. White and Hudson, 134 Iowa 683, 684, 112 N. W. 164, (reaffirming and qualifying the text), holding that a judgment in a probate proceeding for the sale of real estate of a decedent, is void as to the interest of an heir or other person having an interest or lien thereon, who is not served with notice thereof.

Distinguished in Haws v. Clark, 37 Iowa 357, 358, holding that when the notice served in an action or proceeding lacks some essential requirement, such as to make it amount to *no notice*, the judgment and all proceedings had thereunder are void, either on direct or collateral attack: Hence holding that where a notice in a proceeding by a guardian in the county court to sell land of a minor fails to notify him to appear on a regular term-day of court, but fixes a day other than a term-day, it amounts to *no notice*, and the judgment, orders and proceedings had thereunder are void.

Distinguished and narrowed in Clark v. Little, 41 Iowa 500, 501, holding that where a judgment rendered on a defective return of service of original notice, is sought to be enforced in another action, and the record in the first action does not show that the court decided

upon its sufficiency thereon, the defense that the defendant was never legally served with notice and that the court rendering the judgment had no jurisdiction, is available in the last action.

Distinguished and narrowed in Bradley v. Jamison, 46 Iowa 71, 72, holding that when the notice in an action is served by publication, the record must show that all the requirements of the statute were strictly complied with, or the court will have no jurisdiction, and a judgment rendered thereunder will be void, and subject to attack both directly and collaterally.

Unreported citation, 48 N. W. 730.

Cross references. See further on this question, annotations and cross references under Kitsmiller v. Kitchen (24 Iowa 163), ante. p. 158; Rule 1 of Abell v. Cross (17 Iowa 171); Vol. II, p. 511; Rule 2 of Bonsall v. Isett (14 Iowa 309), Vol. II, p. 242.

2. Courts of General Jurisdiction—Courts of Inferior Jurisdiction—Presumption as to Jurisdiction and Regularity of Proceedings—Collateral Attack of Judgment.—Proceedings of courts of general and superior jurisdiction, unless upon their face manifestly void for want of jurisdiction, cannot be collaterally contradicted or impeached, and must be taken as conclusive.

In the case of an inferior court, if the jurisdiction sufficiently appear, its judgments and decrees stand upon the same footing as those of the former courts, pp. 227, 228.

Reaffirmed and explained in Smith, Stebbins & Co. v. Engle 44 Iowa 268, holding that when jurisdiction is shown to have attached, the subsequent proceedings of a court of limited jurisdiction are presumed as regular as those of a court of general jurisdiction, and its decision, whether correct or otherwise, upon every question properly arising in the case, is binding and conclusive until reversed upon appeal.

Reaffirmed and explained in Perry & Townsend v. Miller, 54 Iowa 284, 5 N. W. 733, holding that when the district court has jurisdiction of the subject-matter and of the parties, its judgment will not be subject to collateral attack.

Reaffirmed and explained in Bacon v. Chase, 83 Iowa 527, 50 N. W. 25, holding that if a court of limited jurisdiction [in this case the county court] is shown by the record to have had jurisdiction of the subject-matter and of the parties, its proceedings will, upon collateral attack, be conclusively presumed to have been legally done.

Reaffirmed and varied in Koehler & Lange v. Hill, 60 Iowa 564, 565, 14 N. W. 749, holding that when a subsequent General Assembly decides and enacts that a prior one did not do that which the records of the prior shows was done, such subsequent determination is void and binding upon no one.

Cross references. See Rule 1 hereof and cross references there found. See further on this question, annotations and cross references

under Rule 2 of Long v. Burnett (13 Iowa 28); Boker v. Chapline (12 Iowa 204), Vol. II, pp. 113 and 33, respectively.

3. Notice—Service of—How Proved—Sec. 2428 of the Code of 1851, Construed.—Sec. 2428 of the Code of 1851, providing that the posting up or service of any notice or other paper required by law may be proved by affidavit of any competent witness attached to a copy of said notice or paper, and made within six months of the time of such posting up, does not preclude proof of service thereof other than by affidavit, p. 228.

Reaffirmed in McLenn v. K. C., St. J. & Council Bluffs Ry. Co., 69 Iowa 321, 28 N. W. 619, under Sec. 3698 of the Code of 1873, corresponding to the section of the text.

4. Executors and Administrators—Resignation of Executor—Appointment of Successor—Powers and Duties of Latter.—Upon the resignation of an executor, the person appointed to the office as successor, whatever may be the peculiar designation applied to him, succeeds to the duties and obligations, as well as the powers of the first executor, and can complete the performance of the duties and discharge of obligations first assumed by the original executor, without delay or interruption, p. 230.

Reaffirmed and extended in Stewart, Adm'r, v. Phenice, 65 Iowa 478-480, 22 N. W. 637; Ellyson, Adm'r, v. Lord, 132 Iowa 134, 138, 99 N. W. 585-587, holding further that upon the resignation or removal of an executor or administrator his successor may recover of the predecessor and the sureties on his bond, assets of the estate in his hands not accounted for, paid out, or distributed to heirs or creditors; that in such case the successor is liable to the legatees or distributees, and must, himself, look to the predecessor and his sureties therefor.

(Note.—The last case—Ellyson v. Lord—seems to impliedly overrule Kelly v. Mann, 56 Iowa 625, 10 N. W. 211, while the first—Stewart, Adm'r, v. Phenice—only distinguishes it.—Ed.)

Distinguished in Hodgins v. Toler, 70 Iowa 24-26, 59 Am. Rep. 435, 30 N. W. 3, holding that when a will confers power upon two executors, or the one who is the *survivor*, to sell the real estate of the testator, granting to them or him discretionary power therefor, and not prescribing the time or manner of sale, or when and under what conditions it is to be sold, that upon the failure of one of the executors to qualify and the subsequent death of the other, an administrator appointed to fill the vacancy has no power to sell such real estate under the power conferred by the will on the executors, or the survivor.

(Note.—See, in this connection, Lees v. Wetmore, 58 Iowa 170, 12 N. W. 238, not citing the text.—Ed.)

Cross references. See further in this connection, Judge of Probate v. Claggett, 72 Am. Dec. 314; Foster v. Wise, 15 Am. St. Rep. 542; Dugger v. Wright, 14 Am. St. Rep. 48.

HUNT v. HOOVER, 24 IOWA 231

(Case arising out of this Action, 34 Iowa 77.)

1. Pleading—Amendments—New Allegations in Amended Petition.—Where in an action for damages for false and fraudulent representations including the purchase of property, the plaintiff is required to elect as to one of several counts of his petition, and elects to stand upon the count averring fraud on the part of defendant, it is not improper for the court to thereupon allow plaintiff to amend his petition claiming relief on the grounds of fraud, and breach of warranty, p. 232.

Special Cross reference. For cases citing the text, and many others, see annotations under Rule 1 of Fulmer v. Fulmer (22 Iowa 230), ante. p. 23.

2. False and Fraudulent Representations in Sale of Patent—Action for Damages in State Court.—An action is maintainable in a court of this state for damages for false and fraudulent representations concerning the nature and purpose of a patent which induced plaintiff to purchase and take an assignment of the Patent Right, p. 233.

Reaffirmed and extended in Lockwood v. Lockwood & Frederick, 33 Iowa 511, holding further that an inventor may maintain an action in a court of this state, and recover an amount agreed to be paid to him by another in consideration of his permitting the invention to be patented in the name of the latter (Defendant).

Distinguished in Rawson v. Harger, 48 Iowa 273, holding that a court of equity of this state will not grant relief for mistake of fact in the sale of a Patent Right, when both parties to the transaction acted in good faith, and with full knowledge of the facts upon which the alleged mistake is based.

CITY OF DES MOINES v. HALL, 24 IOWA 234

1. Municipal Corporations—Dedication of Streets etc., under Code of 1851 Passed Fee Simple—Mineral, etc., under—Right to.—Where a street is dedicated according to Secs. 632, 633, 634 and 637 of the Code of 1851, the city takes the fee simple title, and is entitled to the minerals, coal, etc., which may be under the surface, pp. 238, 243, 244.

Reaffirmed and explained in Yost v. Leonard, 34 Iowa 15, holding that land laid out, platted and recorded under the Act of July 25, 1839, the Code of 1851, or the Code of 1860, showing certain streets, alleys and ways as part of a city, vests the fee simple title to such streets, etc., in the city: And owners of lots abutting thereon have only a right of user thereof in common with the rest of the public; and any such lot owner who obstructs or interferes with the free use

of any such street by the public, or attempts to so do, may be enjoined from so doing upon complaint of the dedicator.

Reaffirmed, explained and extended in Davis v. City of Clinton, 50 Iowa 586, holding further that under Sec. 561 of the Code of 1873, the title in the land platted and dedicated to the public as streets is vested in the city; and that as against the adjoining lot owner or original dedicator, the city has full control over the whole street and not simply over the surface, and it can maintain an action against any person who, without its permission, removes any material from the body of the street, whether such material be superficial or subterraneous.

Reaffirmed and extended in Slatten v. Des Moines Valley R. R. Co., 29 Iowa 152, 153, 4 Am. Rep. 205, holding further that a grant by a city of the right to a railroad company to build and operate its railroad bridge on a certain street, over and across a certain river, carries with it all the incidental rights and powers requisite to the efficacious and beneficial exercise and enjoyment thereof: And that, therefore, such a railroad has the right thereunder, to build its road upon the grade of the street, or any other grade agreed upon, and to build the bridge and all necessary and proper approaches thereto.

Reaffirmed and qualified in Gilcrest Co. et al, v. City of Des Moines, and Ch. R. I. & P. Ry. Co., 128 Iowa 53, 102 N. W. 832, holding that although the title to streets is in the city, it is held in trust for the public; and that any right or privilege granted by the city to another which unreasonably interferes with the free use of a street by the public or any member thereof, or which amounts to a nuisance, may be the subject of relief by injunction upon complaint of any member of the public thereby injured.

Cited in Davis v. C. & N. W. R. R. Co., 46 Iowa 394, the court holding that where a railroad company constructs a railroad track along the street of a city according to the provisions of the statute and as granted the right by the city, its laying an additional track thereon is not, of itself, a nuisance, and does not entitle an abutting owner to relief in damages or by injunction.

Cited in Hollingsworth v. Des Moines & S. L. Ry. Co., 63 Iowa 445, 19 N. W. 326, the court holding that where a lot is condemned under the statute for a right of way of a railroad, the fee simple remains in the land owner, and the land is condemned subject to reversion in case of non-user; but the user is considered to be perpetual, and therefore the measure of damages is the market value of the lot at the time of the condemnation.

Distinguished in City of Dubuque v. Benson, 23 Iowa 248, 249, holding that where the owner of mineral land dedicates streets and alleys over it, declaring in the dedication that "the streets and alleys are dedicated for street purposes and those only," the city has no

right to the mineral under them, but such right remains in the Dedicator.

Distinguished in City of Clinton v. Cedar R. & M. Riv. R. R. Co., 24 Iowa 470, 471, 478, holding that the Legislature may authorize the construction of a railroad over the streets of a city without its consent, and that under such an Act a railroad company may so proceed without the consent of the city, and cannot be enjoined by such city from so doing: That an Act for such purpose not requiring such consent, gives the right to proceed without it.

Distinguished in Pettingill v. Devin, 35 Iowa 355-358, holding that land dedicated to a city for a particular use, can be used for it only; and the Dedicator, and even an abutting lot owner may enjoin and restrain a diversion to any other use or purpose resulting in injury to him; but that if such land is so diverted it does not thereby revert to the Dedicator.

Cross references. See further on this question, annotations under Rule 1 of Milburn v. City of Cedar Rapids & Ch. I. & Neb. R. R. Co. (12 Iowa 246), Vol. II, p. 40; City of Dubuque v. Maloney (9 Iowa 450), Vol. I, p. 606: See, also, in this connection, annotations under Warren v. Mayor of Lyons City (22 Iowa 351), Vol. III, p. 39.

O'HAGAN v. CLINESMITH, 24 IOWA 249

1. **Appeal—Evidence Objected to Generally Below, not Reviewed.**—Errors in the admission of evidence below which was objected to generally, but no ground for the objection was stated; will not—under Sec. 3107 of the Code of 1860—be reviewed or considered upon appeal to the Supreme Court, p. 251.

Reaffirmed in Hawley v. Hunt, 25 Iowa 590 (abstract).

Cross reference. See further, Sec. 3750 of the Code of 1897.

2. **Land—Trespass—Who Cannot Maintain.**—One who has no title to nor right to protect and enjoy land, cannot maintain an action for damages for trespass committed thereon, p. 252.

Cited in Waltemeyer v. Wis., I. & Neb. Ry. Co., 71 Iowa 628, 33 N. W. 141, holding that the owners of land may maintain an action for damages for the permanent injury to the freehold against one who unlawfully or wrongfully appropriates a portion of his land, and destroys a spring of water.

GOODRICH v. CONRAD, 24 IOWA 254

(Case arising out of this controversy, 28 Iowa 298.)

1. **Decedent's Estate—Action against Administrator on Mere Money Demand in District Court—Approbation of County Court to be Shown.**—In order to entitle one—under the Code of 1860—to sue an administrator on a mere money demand against decedent, the approbation of the county court to the prosecution of the action must

be shown, if objection to the jurisdiction of the district court is made, p. 256.

Special Cross reference. For cases citing the text, and others on the question, see annotations under *Sterritt v. Robinson* (17 Iowa 61), Vol. II, p. 493.

2. Decedent's Estate—Limitation as to Filing and Proving—Third Class Claims.—Sec. 2405 of the Code of 1860, requiring claims against a decedent's estate to be filed and proved within eighteen months after notice of the death of decedent and the appointment of an administrator, applies only to fourth class claims; and a claim of the third class may be proved after the expiration of eighteen months from the date of filing, p. 257.

Reaffirmed in *Smith v. McFadden*, 56 Iowa 486, 9 N. W. 352, under the Code of 1873.

3. Decedent's Estate—Claim Against may be Sworn to After it is Filed.—A claim against a decedent's estate may be sworn to after it is properly filed; and the omission of the oath required by Sec. 2391 of the Code of 1860, does not render the filing thereof void, p. 257.

Reaffirmed in *Wile v. Wright*, Adm'x, 32 Iowa 457; *McCrary v. Deming*, 38 Iowa 531; *Moore v. McKinley, et al*, Ex'rs., 60 Iowa 370, 14 N. W. 770; *Wise v. Outtrim*, Ex'x, 139 Iowa 199, 117 N. W. 267.

Cited in *Rush v. Rush*, 46 Iowa 651, 26 Am. Rep. 179, the court holding that Sec. 3157 of the Code of 1873, requiring a petition to set aside a decree to be verified by affidavit is directory merely; and that such a petition unverified, gives the court jurisdiction; that if the defendant is not willing to waive the verification he may, on motion, compel an amendment, or the petition will be stricken out.

DAVIS & Co v. GIBBON, 24 IOWA 257

1. Insolvent Debtor—Preference may be Given to Particular Creditors—Assignment for Benefit of Creditors.—A debtor has a right to secure his creditor at any time by a sale, transfer, or mortgage of his property, and this without reference to other creditors, provided he acts in good faith and without fraudulent design; and the fact that the debtor is insolvent at the time, will not affect the validity of the transaction, or cause a mortgage so executed to be treated as an assignment for the benefit of all of his creditors, p. 263.

Reaffirmed in *Letts, Fletcher & Co. v. McMaster & Dryden*, 83 Iowa 456, 49 N. W. 1037.

Cross references. See further on this question, annotations and cross references under *Lampson & Powers v. Arnold* (19 Iowa 479); *Rule 3 of Fromme v. Jones* (13 Iowa 474), Vol. II, pp. 751 and 176, respectively.

CLARK v. BOARD OF DIRECTORS OF THE INDEPENDENT SCHOOL DISTRICT OF MUSCATINE, 24 IOWA 266

1. Mandamus—When Lies—Discretion of School Board of Directors not to be Controlled by.—If the board of directors of a school district is vested with a discretion in a particular matter, it will not be controlled by mandamus, whether wisely or unwisely exercised. But if such board is refusing to perform an imperative duty it may be compelled to so do by mandamus, p. 270.

Reaffirmed and explained in Bailey v. Ewart, 52 Iowa 112, 2 N. W. 1010, holding that mandamus will not lie to compel an officer to do a discretionary act.

Reaffirmed and explained in Preston v. Board of Education, 124 Iowa 356, 357, 100 N. W. 55, holding that mandamus will lie to compel a school board to act in all cases where action is enjoined upon it by law; that where a duty, ministerial in character, and admitting of no question or qualification, is enjoined as a matter of law, the performance of such duty may be commanded in terms; but that where the duty imposed upon the board or tribunal involves an exercise of discretion based upon facts to be found by it, mandamus will not lie, however erroneous the conclusion reached.

Reaffirmed and extended in Brown v. Crego, 32 Iowa 501, holding further that a county officer may be compelled by mandamus to perform the duties of his office; and that the writ may be granted—under Sec. 3761 of the Code of 1860—upon the petition of a private party aggrieved when the public interest is not involved.

Reaffirmed and extended in Bradfield v. Wart, 36 Iowa 295, holding further that mandamus lies at the instance of a party aggrieved to compel a board of canvassers to count the votes of an election, and to declare and certify as elected, the persons receiving the highest number of votes cast for the various offices thereat.

Cited in Burdick v. Babcock, 31 Iowa 576, (dissenting opinion), the majority court holding that the board of directors of an independent school district has the power to make a rule providing for the suspension from school of a pupil who is absent a given time or number of times, for other reason than sickness, providing the rule be reasonable.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

Cross references. See Rule 2 hereof. See further, annotations under Rule 1 of Bryan v. Cattel, Auditor (15 Iowa 538), Vol. II, p. 381.

2. Common Schools Open to White and Colored Pupils—District School Directors Cannot Compel Colored Pupils to Attend Separate School—Mandamus.—Under the Constitution of 1857 and the laws of this state, the common schools hereof are open equally

to white and colored pupils of school attendance age; and the board of directors of an independent school district has no power or discretion to require colored pupils to attend a separate school for colored pupils.

When such board has made such an order or rule, mandamus will lie at the instance of such a colored pupil to compel the board to allow him to attend a school which he has a legal right to attend, pp. 270, 274, 277.

Reaffirmed in Smith v. Board of Directors of Independent Sch. Dist. of Keokuk, 40 Iowa 519; Dove v. Independent Sch. Dist. of Keokuk, 41 Iowa 692, 693.

Reaffirmed and explained as to second paragraph in Perkins v. Board of Directors of Independent Sch. Dist. of West Des Moines, 56 Iowa 479, 480, 9 N. W. 357, holding that when the rights of a citizen are involved in the exercise of authority by a school officer, the courts may determine whether such authority was lawfully exercised; and that mandamus lies to compel a school to admit a pupil who has been unlawfully excluded: Holding further that the board of directors of a school district may only make a rule providing for a pupil's expulsion as a punishment for a breach of discipline or offenses against good morals.

Cited with approval as to second paragraph in Preston v. Board of Education of Independent School Dist. of Marion, 124 Iowa 357, 100 N. W. 55; the court holding that when a board of directors of a school district or the board of education has exceeded its jurisdiction, or has acted in disregard of the duty enjoined upon it by law, it may be required by mandamus to retrace its steps, and to proceed thereafter according to law.

Cited as to first paragraph in Burdick v. Babcock, 31 Iowa 577 (dissenting opinion), the majority court holding that the board of directors of an independent school district has the power to make a rule providing for the suspension from school of a pupil who is absent a given time or number of times, for other reason than sickness, provided that the rule be reasonable.

Cited as to first paragraph in Cogger v. Northwest Un. Packet Co., 37 Iowa 154, the court holding that a colored passenger on a boat is entitled to all the rights and privileges of white passengers; and that a steamboat company is liable in damages for the acts of its officers and employes in forcibly removing such colored passenger from a dining table used by white passengers, although it was a custom and rule of the company that colored passengers were not to eat at a table with white ones.

Cited as to first paragraph in Shaw v. City Council of Marshalltown, 131 Iowa 141, 147, (dissenting opinion), 10 L. R. A. (New Series) 825, 104 N. W. 1126, the majority court upholding the constitutionality of Chap. 9, Laws of Thirtieth General Assembly, granting

preference in appointment to minor municipal offices, to soldiers, sailors and marines from the Army and Navy of the United States in the late Civil War, who are citizens and residents of this state.

And see 146 Iowa 102, 123 N. W. 236.

Cross reference. See Rule 1 heretof, in this connection.

WARRINGTON *v.* POLLARD, 24 Iowa 281, 95 AM. DEC. 727

1. Tender—Must be Kept Good to Save Defendant from Costs—What Insufficient.—In order to constitute a valid tender of the amount of debt sued on so as to save the defendant from costs, the money must be brought into court and deposited; and when this is done after the trial has begun, it is too late and insufficient, pp. 282, 283.

Reaffirmed in part in Shugart & Liminger *v.* Pattee, 37 Iowa 424, 425, holding that a tender must be kept good by bringing the money into court and depositing it.

Reaffirmed and extended in Martin *v.* Whisler, 62 Iowa 617, 17 N. W. 594, holding further—as does the present case in argument—that where in an action for debt, the defendant makes a tender of an amount which he admits to be due, he must, in order to avoid liability for costs, tender the costs which have accrued to the time of the tender.

Cross references. See further on this question, annotations under Mohn *v.* Stoner (14 Iowa 115), Vol. II, p. 213; Mohn *v.* Stoner (11 Iowa 30), Vol. I, p. 765.

CITY OF PELLA *v.* SCHOLTE, 24 Iowa 283, 95 AM. DEC. 729

(Case arising out of same subject-matter, 40 Iowa 625.)

1. Municipal Corporations—Dedication of Land to Public Use—Words "Garden Square" on Plat Insufficient to Show—Extra-neous Proof.—The words "garden square" on a plat of land in a city are not sufficient to show that it was dedicated by the owner as a public square: And when, in such case, the evidence fails to show that the owner intended such words to mean "public square," and the evidence further shows that the owner continued to use the square as his private property, the fact of dedication is not established, pp. 288-290.

Distinguished in Scott *v.* City of Des Moines, 64 Iowa 444, 20 N. W. 754, the court holding that the words "market square" as a designation of a certain land, on a plat of lands laid out as part of a city, when taken into connection with the facts that the city subsequently omitted it from taxation, and that the owner never thereafter exercised any ownership thereover inconsistent with its use by the public, sufficiently establishes the fact of dedication of such land designated as "market square."

2. Limitation of Actions—Statute Does not Run Against the State.—The statute of limitation does not apply to actions by the State, p. 293.

Reaffirmed and extended in County of Des Moines v. Harker, 34 Iowa 86, 87, holding further that the statute of limitation does not apply to actions by or in behalf of the State.

Cross reference. See Rule 3 hereof.

3. Limitation of Actions—Adverse Possession—Action for the Recovery of Real Estate by Municipal Corporation.—An action by a city to recover real estate [in this case a square claimed to have been dedicated to the public] is barred, if not commenced within ten years after the cause of action accrued, as provided by the statute of limitation (Code of 1860), when the action is against one who has been in possession of the property under color of title or adverse claim for the statutory period, p. 293.

Reaffirmed and explained in Smith v. City of Osage, 80 Iowa 87-89, 8 L. R. A. 633, 45 N. W. 405, holding that where land is platted as streets, alleys, and a public square of a city, but is never taken possession of by the city, or used for such purposes by the public, the statute of limitation runs against the city and the public, in favor of one who has been in the actual, open and notorious possession of the land so platted, under color of title for the statutory period of ten years, and who has paid taxes thereon assessed by the city against him therefor.

Reaffirmed and explained in Weber v. Iowa City, 119 Iowa 640, 93 N. W. 640, holding that when a street of a city has not been used as such by the public for more than the statutory period of limitation of actions for the recovery of real estate, during which period it has been in the actual and exclusive possession of one holding under claim of right, without protest or interference from the city, its officers, or the general public, the right of the city and the general public therein or thereto is thereby lost.

Reaffirmed and extended in Davies v. Huebner, 45 Iowa 577-579, holding further that where there has been a total abandonment of a public road for a period of ten years, and an owner of land adjoining has inclosed and been in actual, open, visible and notorious possession thereof for such period, the statute of limitation applies, and the public is estopped from claiming any right or title therein.

Distinguished and narrowed in City of Waterloo v. Un. Mill Co., 72 Iowa 439, 34 N. W. 198, holding that the right of a city and of the public to the use and occupancy of a *street* is not barred by the statute of limitation: That the city is but an instrument for the exercise of the authority of the state, and its municipal powers in establishing and maintaining a street are exercised in the discharge of Governmental functions; and the statute of limitation, therefore, will not run to

defeat the exercise of its Governmental authority: Holding, however, that in a case wherein arise questions involving property or contracts which do not pertain to the exercise of a city's Governmental authority, the statute of limitation will run.

Distinguished and narrowed in City of Muscatine v. Ch. R. I. & P. Ry. Co., 79 Iowa 648, 649, 44 N. W. 910, holding that the statute of limitation runs against a city's action on a contract or for damages for violation thereof; and that this rule applies as to an action by a city to recover damages for violation of an ordinance treated as a contract.

(Note.—See further, City of Davenport v. Boyd, 109 Iowa 248, 77 Am. St. Rep. 536, 80 N. W. 314; Smith v. Gorrell, 81 Iowa 218, 46 N. W. 992; Orr v. O'Brien, 77 Iowa 253, 14 Am. St. Rep. 277, 42 N. W. 183; Getchell v. Benedict, 57 Iowa 121, 10 N. W. 321; Simplot v. City of Dubuque, 49 Iowa 630; Austin v. Bremer County, 44 Iowa 155; Audubon County v. Am. Em. Co., 40 Iowa 460; Adams County v. B. & M. R. R. Co., 39 Iowa 507, some important cases on this question and in its connection, not citing the text.—Ed.)

SHIELDS v. KEYS, ADMINISTRATOR, 24 Iowa 298

1. Mechanic's or Materialman's Lien—When Attaches—Action to Foreclose—Title of Purchaser at Sale under Foreclosure Decree—Purchaser or Mortgagee from Land Owner.—Under the Code of 1851, the lien of a mechanic or materialman attaches at the time of the commencement of the labor or the furnishing of the first materials for the improvement of real estate: And the purchaser at a sale thereof under a decree of foreclosure takes the title of the land owner at the time the lien attached, and free from the rights of a purchaser, or mortgagee from the land owner after the attaching of the lien, pp. 306, 307.

Cited in Evans v. Tripp, 35 Iowa 375, the court holding that under the Code of 1851, as amended by Chap. 111, Laws of 1862, a mechanic or materialman has a lien as against the owner, purchasers and incumbrances, on the premises on which work is done, or materials are furnished in the erection of a house or other improvements, for ninety days after the completion of the work or furnishing of the last materials, and a lien on the premises from the expiration of such ninety days until he files his statement, as against the owner, or incumbrancers or purchasers with actual notice of his lien.

Special Cross reference. For further cases citing the text, see annotations under Rule 2 of Vannice v. Bergen (16 Iowa 555), Vol. II, p. 474.

2. Mechanic's or Materialman's Lien—Action to Foreclose—Conclusiveness of Decree.—A decree foreclosing a mechanic's or materialman's lien is conclusive on the parties thereto as to any rights which they did or might have asserted therein, p. 308.

Distinguished in Evans v. Tripp, 35 Iowa 375, holding that under Sec. 1858 of the Code of 1860, that all parties having an interest in property charged with a lien may be made parties to an action for its foreclosure; but that if not made parties thereto they are not bound by the proceedings therein.

Distinguished in Jones v. Hartsock, 42 Iowa 152, 153, holding that under the Code of 1851, as amended by Chap. 111 Laws of 1862, a mechanic or materialman has a lien as against the owner, purchasers and incumbrancers, on the premises on which work is done or materials are furnished in the erection of a house or other improvement, for ninety days after the completion of the work, or furnishing of the last materials, and a lien on the premises from the expiration of such ninety days until he files his statement, as against such parties; purchasers, etc., with actual notice of his lien.

3. Husband and Wife—Dower Right of Husband May be Waived by Acceptance of Provisions of Wife's Will—Rights of Husband's Creditors.—A surviving husband may assent to the provisions of his wife's will devising all of her real estate, and such assent or failure to object thereto waives the husband's right of dower in such estate, and passes title at once to the devisee, free from the rights of a judgment creditor of the husband, pp. 309, 310.

Reaffirmed and explained in Merchants' Nat'l Bank v. Crist, 140 Iowa 313, 314, 118 N. W. 396, holding that the surviving husband has a right to relinquish his statutory share and accept the provision made in his wife's will; that this kind of election cannot be controlled by his creditors, although it results in disadvantage to them: Holding, also, that the fact that the husband surrendered a right to property which might have been subjected to the payment of his debts, in exchange for the benefit which would accrue to him under the provisions for his support, would not entitle his creditors to subject the benefit accruing to him out of such provision to the payment of their claims, unless the nature of the right accepted by him under the will is such that it may be reached by creditors.

Reaffirmed and explained in Robertson v. Schard, and Datin, sheriff, 142 Iowa 503-505, 119 N. W. 531, holding that a surviving husband may accept the provisions of his deceased wife's will and thereby waive and relinquish his rights under the statute; and that the fact that by his choice to take under the will he gets nothing which can be subjected to the payment of his debts, whereas had he taken under the statute the property so acquired could be seized by his creditors, is wholly immaterial.

Reaffirmed and extended in Brightman v. Morgan, 111 Iowa 483, 82 N. W. 955, holding further that where a husband files an election to take under the will of his deceased wife in lieu of dower or distributive share, receives some of the benefits of the will, and when served with notice of the filing of the final report of the executrix

and her application for discharge, makes no objection thereto, such facts constitute an election to take under the will, and his creditors cannot subject his dower or distributive share in his wife's estate to levy and sale under execution: And this is the rule although the election was filed more than eight months after notice of the provisions of the will by the other party interested was given to the husband, as provided by Sec. 2452 of the Code of 1873, and although such election was not entered of record as required by that section.

Reaffirmed and varied in Piekenbrock & Sons v. Knoer, 136 Iowa 540, 541, 114 N. W. 202, holding further that a surviving husband of a wife who dies intestate has a right to take a homestead right instead of a distributive share in the land left by the wife, and that his creditors cannot object thereto or claim fraud by reason thereof: And that where the husband chooses to take a homestead right, the entire title to the wife's realty vests in her heirs, subject only to the homestead right, and the property in their hands is in no manner subject to the payment of the husband's debts.

Cited with approval in Everett v. Croskrey, 92 Iowa 335, 336, 60 N. W. 733, holding that when a surviving husband fails to consent to the provisions of his wife's will within six months after notice to him of its provisions by the other parties interested, as provided by Sec. 2452 of the Code of 1873, he will be presumed to have elected to take his one-third distributive share under the law.

Cited in Potter v. Worley, 57 Iowa 68, 10 N. W. 298, the court holding that when a widow's claim to dower is not inconsistent with her husband's will she is not required to object to or relinquish her rights under the will before she can have dower; and that in such case dower vests in the widow at her husband's death without action on her part, and regardless of the provisions of his will.

Cited in Sturdevant v. Norris, 30 Iowa 69, not in point.

Unreported citation, 132 N. W. 380.

4. Husband and Wife—Right of Wife to Acquire Real Estate—Husband's Creditors—Rights of.—A wife may—under the Code of 1860—acquire real estate relying upon receiving and paying therefor with money received from her son; and such property is not subject to the satisfaction of her husband's debts, p. 313.

Reaffirmed and extended in Second Nat'l Bank of Rockford v. Gaylord, 66 Iowa 584, 585, 24 N. W. 57, holding further that a wife may purchase realty, and pay a portion of the purchase price with her own funds, relying on paying the balance thereof by a sale of a portion at an advance price; and that such land will not be subject to the satisfaction of debts of her husband: Holding further that a husband may aid his wife to procure title to real estate, and it will not thereby be subjected to the satisfaction of his debts, provided he does not furnish any of the means to pay therefor.

Cited in Croup & Shafer v. Morton, 49 Iowa 24 (dissenting opinion), the majority court holding that when a wife purchases homestead, and pays part of the purchase price and her husband who is insolvent, pays the balance of the purchase price, an antecedent creditor of the husband may, in equity, subject the land to the satisfaction of his debt, to the amount of the purchase money paid by the husband.

Distinguished in Hamilton v. Lightner, 53 Iowa 473, 474, 5 N. W. 606, holding that property acquired by the wife by the use of the husband's means, or those which the law recognizes as his, to the prejudice of his creditors, will be subjected in equity to the latter's demands; and the transactions by which the property was so acquired will be treated as fraudulent in equity.

Cross references. See further in this connection, annotations under Rule 2 of Jones v. Crosthwaite (17 Iowa 393); Duncan v. Roselle (15 Iowa 501), Vol. II, pp. 546 and 372, respectively.

PARSHALL v. MOODY, 24 IOWA 314

1. Actions—Non-joinder of Necessary Parties—Objection as to Taken First upon Appeal—Effect.—An objection that a necessary party to an action is not joined as a party to an action, when taken for the first time upon appeal to the Supreme Court and though well taken, will not operate to dismiss the petition, but only to remand the cause for further proceedings in the court below, p. 319.

Reaffirmed in Tod v. Crisman, 123 Iowa 699-701, 99 N. W. 689, holding that objection to non-joinder of parties indispensable to the final adjudication of the rights of parties to an action may be taken for the first time upon appeal to the Supreme Court.

Distinguished and narrowed in Coe v. Anderson, 92 Iowa 516, 517, 61 N. W. 177, holding that the rule only applies where the defect of parties is of such a nature that relief could not be granted by the court below because of the non-joinder of necessary parties; that an objection as to defect of parties in all other cases, or at least when not jurisdictional, must be first made in the lower court; and that a defect as to parties which is apparent on the face of the petition is waived, when not jurisdictional, if not raised by demurrer, or possibly by answer or reply.

2. Actions—Transferring Action to Chancery Docket—Appeal—Exception not Taken Below.—An objection that an action was improperly transferred to the chancery docket will not be considered upon appeal to the Supreme Court, when no exception was taken below to the order transferring, at the time it was made, p. 319.

Reaffirmed and explained in Richmond v. Dub. & Sioux C. R. R. Co., 33 Iowa 490, 491, holding that where an action is improperly brought in equity when it should have been brought at law, unless the

defendant makes a motion to transfer to the law docket at the time of filing his answer (under Sec. 2619 of the Code of 1860), the right to a jury trial therein is waived, along with the error as to the kind of proceeding adopted.

Reaffirmed and explained in Clearfield Bank v. Olin, 112 Iowa 478, 479, 84 N. W. 508, holding that where an action is tried in equity without objection, the right to have it otherwise tried will—under Sec. 3437 of the Code of 1897—be deemed waived.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

ACKLEY v. SEXTON, 24 IOWA 320

1. Tax Deed to Several Parcels of Land Showing on Face That They Were Sold in Gross for Lump Sum—Effect.—Where a tax deed to several parcels of land shows on its face that they were sold in a lump and for a gross sum, it is void, p. 321.

Special Cross reference. For cases citing and sustaining the text, and others, see annotations under Boardman v. Bourne (20 Iowa 134), Vol. II, p. 791.

2. Tax Deed Reciting Several Parcels of Land Sold in Gross for Lump Sum Void—New Deed by Treasurer.—Whether when a tax deed is void by reason of showing that several parcels of land were sold in gross for a lump sum, the treasurer may make a new deed on his own motion reciting that the parcels were sold separately and for different sums, is not decided, p. 322.

Special Cross reference. For cases citing the text, and others on the question, see annotations under Boardman v. Bourne (20 Iowa 134), Vol. II, p. 791.

Cross reference. See further on this question, annotations under Rule 2 of Harper v. Sexton (22 Iowa 442), ante. p. 52.

3. Evidence—Deed—Secondary Evidence of Contents—When Admissible.—Secondary evidence of the contents of a deed is—under Secs. 4001, 4002 of the Code of 1860—inadmissible to prove title, until the party offering it introduces proof that the original is lost, or that it does not belong to him, and is not within his control; and this rule applies to the introduction in evidence of the record of such deed, or a certified copy thereof, p. 321.

Special Cross reference. For cases citing and sustaining the text, and others, see annotations under Rule 1 of Williams v. Heath (22 Iowa 519), ante. p. 64.

SMITH & CO. v. McLEAN, 24 IOWA 322

1. Pleading—Petition—Failure to File Exhibit—Demurrer—Waiver.—The fact that plaintiff fails to file an exhibit with his pe-

tition which the law requires him to file therewith must—under Secs. 2876, 2878 of the Code of 1860—be raised by demurrer, or it will be deemed waived, p. 324.

Reaffirmed and extended in Price v. Baldauf, 82 Iowa 676, 46 N. W. 986, holding further that under Sec. 2650 of the Code of 1873, a defect as to necessary allegation to entitle plaintiff to an injunction, which defect is apparent on the face of the petition, is waived by a failure to file a demurrer thereto.

2. Replevin—When Demand Necessary before Commencing Action—When Not.—Unless a demand is necessary to terminate defendant's right to possession of personal property or to give the plaintiff that right, it is not required to be made before commencing an action of replevin, pp. 325, 326.

Reaffirmed in Delancey v. Holcomb, 26 Iowa 96; Jones v. Clark, 37 Iowa 591; Redding v. Page, 52 Iowa 407, 3 N. W. 428; Oswego Starch Factory v. Lendrum, 57 Iowa 576, 577, 42 Am. Rep. 53, 10 N. W. 902; Ruiter v. Plate, 77 Iowa 19, 41 N. W. 474; Beh v. Moore, 124 Iowa 565, 100 N. W. 502.

Cited in Fay v. Fitzpatrick, 130 Iowa 281, 105 N. W. 399, the court holding that where hay is purchased to be delivered at once, and the seller fails to make such delivery after payment therefor is made, the purchaser may sue for the purchase price without demand on the seller for such delivery.

3. Contracts—Lex Loci Contractus—Chattel Mortgage Executed and Recorded in Foreign State—Enforcement Here—Constructive Notice.—A chattel mortgage which is valid under the law of the state where it is executed and where the mortgaged property was at the time of the execution thereof, will be so held and be given the same force and effect by a court of this state, when the property is removed to this state. And where the chattel mortgage on property in another state is executed and recorded there, and the recording operates as constructive notice there, such notice will be held to apply to a third person of this state dealing with or concerning the property adverse to the interests or lien of the mortgagee, after it has been removed hereto, pp. 329-331.

Reaffirmed in Sims v. McKee & Stimson, 25 Iowa 342.

Distinguished in Aultman & Taylor Machinery Co. v. Kennedy, 114 Iowa 446, 89 Am. St. Rep. 373, 87 N. W. 436, holding that a chattel mortgage executed and recorded in another state, on property some of which is in this state at the time thereof, does not operate as constructive notice to purchasers or attaching creditors of that part of the property which was situated in this state at the time of such execution and recording.

4. Chattel Mortgage—Sufficiency of Description of Property Mortgaged—Constructive Notice.—In a chattel mortgage a descrip-

tion which will enable third persons *aided by inquiries* which the instrument itself indicates and directs, to identify the property, is sufficient.

Such a description in a recorded mortgage imparts constructive notice, pp. 332, 333.

Reaffirmed in McGarry & Brown v. McDonnell, 82 Iowa 733, (abstract), 47 N. W. 866; King v. Howell, sheriff, 94 Iowa 210, 211, 62 N. W. 738, applying the rule to different facts.

Reaffirmed in Yant v. Harvey, 53 Iowa 423, 7 N. W. 675, holding that when the description in a recorded chattel mortgage is correct as far as it goes, but fails fully to point out and identify the property intended to be conveyed, a subsequent purchaser or incumbrancer is bound to make every inquiry which the instrument itself could reasonably be deemed to suggest.

Reaffirmed and explained in Winter v. Landphere, 42 Iowa 473, holding that nothing short of a description of personalty mortgaged as set out in the text, will impart constructive notice by reason of the recording of the instrument.

Reaffirmed and explained in Irvins v. Hines, 45 Iowa 75, holding that a recorded mortgage on "fourteen cows, branded with a star on right horn," does not impart constructive notice that fourteen cows not so branded are the ones therein included, and that a good faith purchaser of the latter takes free from the lien of the mortgage, although they be the cattle in fact mortgaged.

Reaffirmed and explained in Everett v. Brown, 64 Iowa 422, 20 N. W. 743, holding that a description in a recorded mortgage describing the property as "sixty hogs," but not stating their age, size or where found, imparts no constructive notice, and is void, for uncertainty as to third persons.

Reaffirmed and explained in Rhutasel v. Stephens, 68 Iowa 628, 27 N. W. 786, holding that a description of mortgaged property in a recorded mortgage of "all my (the mortgagor's) stock hogs, being forty, more or less, with the pigs now with them," is sufficient to impart constructive notice, and is good as against third persons and attaching creditors of the mortgagor.

Reaffirmed and explained in Wells v. Wilcox, 68 Iowa 709, 710, 28 N. W. 29; Colean Implement Co. v. Strong, 126 Iowa 599, 600, 102 N. W. 506, holding that a recorded chattel mortgage which enumerates the articles mortgaged, and states or shows that they are in the possession of the mortgagor in a certain county, imparts constructive notice, and is good as against third persons, and attachment or execution creditors of the mortgagor.

Reaffirmed and explained in Wheeler v. Becker, 68 Iowa 724, 28 N. W. 40, holding that where a chattel mortgage describes the mortgaged property as "one bay horse, seven years old, weight 1,150; one bay mare, nine years old, weight 1,250; and all crops to be grown or raised" by the mortgagor in 1884, and then describes the land on

which the crops are to be grown or raised, and further shows that the property is in the possession of the mortgagor, it is sufficiently certain to bind the property in favor of the mortgagee and as against a levy under execution in favor of another creditor of the mortgagor.

Reaffirmed and explained in Kenyon v. Tramel, 71 Iowa 694, 28 N. W. 37, holding that a recorded chattel mortgage describing the mortgaged property as "fifty head of steers about twenty months old, now owned by me, and in my possession on my farm in Independence Township, Jasper County, Iowa," imparts constructive notice as to subsequent purchasers.

Reaffirmed and explained in Sandwich Mfg. Co. v. Robinson, 83 Iowa 568-570, 14 L. R. A. 126, 49 N. W. 1031, holding that a recorded chattel mortgage which, after mortgaging a threshing machine by a sufficient description, attempts to mortgage "all the threshing machine accounts which we shall earn or shall become due us by the work of the above machine from now until this debt is paid in full," is insufficient to impart constructive notice as to the accounts, and is not binding as to them as against an execution or attaching creditor of the mortgagor.

Reaffirmed and explained in Shellhammer v. Jones, 87 Iowa 522, 523, 54 N. W. 363, holding that when a recorded chattel mortgage describes the mortgaged property, and shows that it is in the possession of the mortgagor in a certain county, and the mortgagor owned no other property of the kind described, the instrument imparts constructive notice to subsequent purchasers and mortgagees.

Reaffirmed and explained in Taylor, and Citizens' Nat'l Bank of Des Moines v. Gilbert, 92 Iowa 588, 589, 593, 61 N. W. 203, holding that a recorded chattel mortgage describing the mortgaged property as a certain number of pure blood hereford cattle, giving their names and stating that they were recorded in the American Hereford Herd-book, but containing no further description of the cattle, or of where they were to be found, is insufficient to impart constructive notice to subsequent purchasers or mortgagees.

Reaffirmed and explained in Davis v. Pitcher, 97 Iowa 14-16, 59 Am. St. Rep. 392, 65 N. W. 1005, holding that where a recorded chattel mortgage mortgages a stock of goods owned by the mortgagor contained in a certain building, fully and definitely describing the latter, and then conveys and mortgages "all books of account, and accounts and notes, contracted and to be contracted from the sale of merchandise kept by me in said above described building," it imparts constructive notice as to the latter and entitles the mortgagee to maintain replevin therefor.

Reaffirmed and explained in Gilchrist v. McGhee, 98 Iowa 509, 67 N. W. 392, holding that a description of the mortgaged property in a chattel mortgage of "one pair wagon scales, in Waterville, Iowa,"

is insufficient as against an execution creditor of the mortgagor who seizes such property under such writ.

Reaffirmed and explained in Farmers' & Merchants' Bank v. Stockdale, 121 Iowa 751, 752, 96 N. W. 732, holding that in order for a recorded chattel mortgage to impart constructive notice, there should be a designation of the property mortgaged, and the place where it may be found, sufficiently specific to enable a third person to go to the place indicated and set the property apart.

Reaffirmed, explained and extended in Andregg v. Brunskill, 87 Iowa 352, 354, 43 Am. St. Rep. 388, 54 N. W. 135, holding that a recorded chattel mortgage describing the mortgaged property as "fourteen steers one year old, crop off left ear, and slit in same ear; four heifers one year old, marked on ear as above steers," is insufficient to impart constructive notice: Holding further that the question of the sufficiency of the description in a mortgage, to render it competent evidence, is for the court; but that where the description in the mortgage is sufficient to authorize it in evidence, the question of the identity of the property claimed, with that described in the mortgage is a question for the jury.

Reaffirmed and extended in Frick, Adm'r, v. Fritz, 115 Iowa 441-445, 91 Am. St. Rep. 165, 88 N. W. 961; Colean Implement Co. v. Strong, 126 Iowa 600, 102 N. W. 506, holding further that parol evidence is admissible to identify mortgaged chattels.

Reaffirmed and varied in Myers, Tice & Co. v. Snyder, 96 Iowa 110, 111, 64 N. W. 771, holding that a mortgage on a specific stock of goods, and "all the fixtures of every name and nature contained in the storeroom where said stock is located" is sufficiently definite as to all of the property: And that in an action to foreclose the mortgage, parol evidence is admissible for the purpose of identifying it.

Reaffirmed and qualified in Rowley v. Bartholomew, 37 Iowa 376, holding that when a description of a mare mortgaged does not indicate facts sufficient to put a subsequent purchaser or mortgagee upon inquiry such as would lead to her identification and there is no proof of such subsequent purchaser, etc., having knowledge of facts and circumstances such as would have put him upon inquiry which would have resulted in his identifying her, and the mortgage first given imperfectly described the mare so as to have applied equally to another owned by the mortgagor at the time of its execution, the recording thereof and description therein does not impart constructive notice.

Reaffirmed and qualified in Adams v. Commercial Nat'l Bank of Dubuque, 53 Iowa 492, 493, 5 N. W. 619, holding that when a recorded mortgage on a growing crop of wheat describes it as growing on a certain section, township and range, and there are several sections of land in the county corresponding to that set out in the instrument, and no township or range in the county corresponding to that therein given, such mortgage does not impart constructive notice.

Reaffirmed and narrowed in Ormsby Bros. & Co. v. Nolan, sheriff, 69 Iowa 131, 132, 28 N. W. 569, holding that a recorded chattel mortgage describing the mortgaged property as "one open buggy, with fills new, made by Taylor Brothers, Emmetsburg, and bought of them; and one sulkey, new, made by Taylor Brothers, Emmetsburg, Iowa," is insufficient to impart constructive notice, and that the rights of an execution creditor of the mortgagor, acquired by levy of execution without actual knowledge of the mortgage are superior thereto.

Cited in City of Fort Dodge v. Moore, 37 Iowa 390, the case turning upon the sufficiency of description of personal property in a petition in an action to recover its possession.

Cited Palmer v. Albee, 50 Iowa 435 (dissenting opinion), the majority court opinion not in point.

Distinguished and narrowed in Muir v. Blake, 57 Iowa 665, 11 N. W. 623, holding that a recorded mortgage on "all crops raised by me (mortgagor) in any part of Jones County for a period of three years," imparts no constructive notice to third persons.

Distinguished and narrowed in Eggert v. White, 59 Iowa 465, 466, 13 N. W. 426, holding that a recorded mortgage on "the entire crop of flax, wheat and other grain or produce raised on" certain land, is insufficient to put a subsequent purchaser, or mortgagee to or upon the land or crops growing thereon, upon inquiry as to whether the growing crops were included in the first mortgage.

Distinguished and narrowed in Hayes v. Wilcox, 61 Iowa 732, 733, 17 N. W. 110, holding that a description in a chattel mortgage describing the property as "one oscillating thresher, size 6, 30-inch cylinder, and also, one Chicago Pitts ten-horse power," will be held too indefinite and uncertain as between the mortgagee and a creditor, of the mortgagor.

Distinguished and narrowed in Caldwell v. Trowbridge, sheriff, 68 Iowa 150, 151, 26 N. W. 49, holding that a description in a mortgage, describing the property as "sixty head of two and three year old steers, and forty head of yearling steers * * * in Clay Township, Shelby County," is insufficient to give the mortgagee superior rights to those of an attachment creditor of the mortgagor or to allow such mortgagee to maintain replevin for any such cattle so attached.

Distinguished and narrowed in Rhutasel v. Stephens, 68 Iowa 628, 629, holding that a recorded chattel mortgage describing the mortgaged property as "one span of colts, three years old, one gray, one bay; eight cows, one seven years old, white, and with red spots; one same age, and about same color; one brindle cow six years old; one cow four years old, with calf with her, blind in one eye; one four years old, red and white, with calf with her also; one eight years old, red, with white face; one roan cow six years old," does not impart constructive notice, and is insufficient as against third persons, and attaching creditors of the mortgagor.

5. Appeal—Verdict Against Weight of Evidence—Conflicting Evidence—Affirmance.—Where the evidence below was conflicting, the ruling of the trial court in refusing to grant a new trial because the verdict was against the weight of the evidence will not be reversed upon appeal to the Supreme Court, unless the verdict is clearly against the weight of the evidence, pp. 333, 334.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Rule 2 of Brockman v. Berryhill (16 Iowa 183), Vol. II, p. 423.

TUCKER v. SHINER, 24 IOWA 334

1. Promissory Note—Action Against Maker and Assignor or Guarantor Allowed—Averments of Petition.—Under the Code of 1860, the maker and assignor or guarantor may be joined in an action on a promissory note, whether it is negotiable or non-negotiable; but in such case the averments concerning each party should be in separate counts of the petition, p. 335.

Reaffirmed in Stout & Co. v. Notman, 30 Iowa 415.

Reaffirmed and extended in Huse v. Hamblin, 29 Iowa 506, 4 Am. Rep. 244, holding further that the assignee of a non-negotiable instrument may jointly sue the maker and all assignors or guarantors thereof, without demand upon the maker and notice of non-payment.

MCCORD v. HIGH, 24 IOWA 336

1. Officers—Judicial Act—What Is Not.—The fact of an officer being clothed with discretion in the discharge of a duty as to the *manner* of its performance, or as to the control of circumstances and attendant acts necessarily arising in the discharge of such duty, will not give to it a judicial character, p. 343.

Cited in Jordan v. Hayne, 36 Iowa 15, the court holding that the action of township trustees in ordering an election to vote a tax and appropriate money in aid of the construction of a railroad—under Chap. 102, Acts of Thirteenth General Assembly—is *quasi* judicial, and the legality thereof may be tested by *Certiorari*.

Cited in Muscatine Western R. R. Co. v. Horton, 38 Iowa 47, the court holding that an officer, or members of a board charged with the duty of determining a matter or a fact is or are not civilly liable for errors of law or of fact in acting thereon, unless he or they act willfully, maliciously or corruptly.

Cited in Smith v. Dist. Township of Knox, 42 Iowa 526, the court holding that the power given to the board of directors of a school district, by Sec. 1734 of the Code of 1860, to discharge a teacher, is judicial in character.

Cross references. See Rule 2 hereof. See further, annotations under Rule 1 of Wasson v. Mitchell (18 Iowa 153), Vol. II, p. 601.

2. Road Supervisor — Liability for Diverting Channel of Stream.—A road supervisor is liable in damages to a land owner for diverting a channel of a stream in constructing a small bridge or culvert not built by the county officers or authorities or under their direction, pp. 342, 345, 346.

Reaffirmed and extended in Gould Schermer, 101 Iowa 587, 588, 70 N. W. 699, holding further that a road supervisor is liable in damages for personal injuries resulting from defects in or the manner of construction of a bridge erected by him, when he failed to exercise the care in its construction which an ordinarily prudent man under similar circumstances would have exercised; and that in such case, the question of whether or not the construction of the bridge without railings or barriers in view of its situation and the use to which it was put, was negligence, is one of fact for the jury to determine.

Reaffirmed and varied in Bills v. Belknap, 36 Iowa 586, holding that a road supervisor may be enjoined by an adjoining land owner from cutting down and removing trees growing upon the side of a road, and which do not impede its public use.

Reaffirmed and varied in Quinton v. Burton, road supervisor, 61 Iowa 476, 16 N. W. 572, holding that an adjoining land owner may enjoin a road supervisor from erecting a bridge which is not broad enough to permit the passage of all machinery and vehicles in use which are drawn upon public highways, and when the bridge proposed to be erected is not sufficiently broad to permit the passage thereover of a reaper or other machine owned by the land owner, and for which purpose the latter uses the road.

Reaffirmed and varied in Bolton v. McShane, 67 Iowa 208, 209, 25 N. W. 136, holding that a road supervisor may be enjoined and restrained by an adjoining land owner from removing a fence along a road, when the latter alleges that the fence is rightfully erected, and the officer threatens to wrongfully remove it.

Distinguished in Sells v. Dermody, 114 Iowa 348, 349, 86 N. W. 327, holding that a road supervisor is not liable in damages for personal injuries resulting from the defective or unsafe condition of a bridge, or portion of a public road, unless he has been notified thereof in writing as required by Sec. 1557 of the Code of 1897, and the accident or injuries occur or are inflicted, after a reasonable time for making repairs has elapsed after such notice is given.

Distinguished in Nolan v. Reed, 139 Iowa 70, 72, 117 N. W. 26, holding that the members of the county board of supervisors are not individually liable in damages for the death of a person caused by the unsafe condition of a public road or highway, unless it is averred in the petition in the action therefor, that the members of the board allowed such road to remain in an unsafe condition, with malice or corruptly: That Secs. 1530 of the Code Supp. of 1907, and 1531 of the

Code of 1897, imposes no duty on the board to see that public roads or highways are kept in a safe condition.

Cross reference. See further in this connection, annotations under Rule 2 of *Wasson v. Mitchell* (18 Iowa 153), Vol. II, p. 601.

3. Officers Who Are Ministerial—Liability in Damages for Acts.—Where a public officer other than a judicial one, does an act directly invasive of the private rights of others, and there is otherwise no remedy for the injury, such officer is personally liable without proof of malice and an intent to injure, p. 350.

Distinguished in *Beeks v. Dickinson County et al*, 131 Iowa 248, 249, 9 Am. & Eng. Ann. Cas. 812, 6 L. R. A. (New Series), 831, 108 N. W. 312, 313, holding that neither the county nor the members of a county board of health are liable to a person for damages resulting to him by reason of a Quarantine against an infectious or contagious disease being established by the board, although the disease did not in fact exist.

Special cross reference. For further cases citing the text, and others, see annotations under Rule 2 of *Wasson v. Mitchell* (18 Iowa 153), Vol. II, p. 601.

4. Torts—Malice, When May be Inferred.—Malice may be inferred from the doing of an act designed to injure another, pp. 347, 348.

Reaffirmed in *State v. Linde*, 54 Iowa 142, 6 N. W. 169.

Special cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 2 of *State v. Hesskamp* (17 Iowa 25), Vol. II, p. 483.

DOANE & CO. v. GARRETSON, 24 IOWA 351

1. Chattel Mortgage—Mortgagee's Liability for Surplus of Proceeds—Garnishment by Unsecured Creditor of Mortgagor.—A mortgagee of a chattel mortgage who takes possession of the property and sells it, or who sells it under foreclosure proceedings, may be compelled to account for any overplus of proceeds after payment of the debt, either to the mortgagor (debtor) or his creditors; and in such case any creditor of the mortgagor may subject the overplus by garnishment, p. 353.

Cited in *Evans v. St. P. Harvester Works*, 63 Iowa 208, 209, (dissenting opinion), 18 N. W. 883, the majority court holding that a mortgagor of exempt personalty can maintain an action for damages by reason of its wrongful seizure and sale under execution of an unsecured creditor.

Cited in *Warder-Bushnell & Glessner Co. v. Harris*, 81 Iowa 154, 46 N. W. 859, holding that a mortgagee of chattels may sue another for the conversion thereof, although the latter converts them claiming under an inferior lien or mortgage.

Distinguished in Gimble, Florshime & Co. v. Ferguson, 58 Iowa 415, 416, 10 N. W. 789, holding that where, after the execution of a chattel mortgage, the mortgagor executes a general assignment for the benefit of his creditors, the latter instrument passes title to the assignee to the overplus of the proceeds of the mortgaged property after payment of the mortgage debt, and free from claims of a subsequent attaching or garnishing creditor of the debtor.

Distinguished in Phelps v. Winters & Hill, 59 Iowa 562, 563, 13 N. W. 730, holding that where a mortgagor of a chattel mortgage agrees with the mortgagee and an attaching or garnishing creditor, that the property be sold and the proceeds be applied first to the payment of the mortgage debt, and then to the payment of the debt of the attaching or garnishing creditor, such agreement operates as a transfer of the mortgagor's equity of redemption, and defeats a subsequent attaching or garnishing creditor of the debtor—there not being an overplus after the satisfaction of the first two mentioned debts.

Distinguished in Buck-Reiner Co. v. Behety, 82 Iowa 355, 48 N. W. 97, holding that where G., a creditor of a mortgagor of personalty, institutes garnishment proceedings against the mortgagee to subject the surplus of proceeds of the mortgaged property after the payment of the mortgage debt and thereafter another creditor of the mortgagor issues attachment proceedings and levies on the property as provided by Chap. 117, Act of Twenty-first General Assembly, that the levying of the attachment does not discharge the garnishee (mortgagee), and G. has the superior right over such subsequent attachment creditor.

Distinguished in Citizens' State Bank v. Council Bluffs Fuel Co., 89 Iowa 622, 624, 57 N. W. 445, holding that although Chap 117 of the Acts of Twenty-first General Assembly allows a creditor to levy on personalty mortgaged, by attachment or execution, by performing the conditions therein laid down, still, this does not prevent such a creditor from contesting the validity of a chattel mortgage alleged to be fraudulent, by garnishment proceedings against the agent of the mortgagee.

2. Evidence—Invoice Admissible to Show Value of Merchandise—Other Evidence of Value.—An original invoice is admissible in evidence to show the value of goods or merchandise. But where such invoice shows no price to many articles, the extension of prices is made to others, and the total value thereof is not therefore shown, a witness may testify that at the time they were invoiced he was acquainted with their value, that he had fixed prices to the articles mentioned in the invoice, extended the amounts and footed them up as appeared in pencil upon a copy attached to the files, pp. 353, 354.

Reaffirmed and extended in Furlong & Meloy v. North Brit. & M. Ins. Co., 136 Iowa 473, 113 N. W. 1036, holding further that al-

though, in an action on a fire insurance policy for loss of goods or merchandise by fire, inventories, invoices and books of the insured furnish competent evidence of the value of his stock, such evidence is not controlling as against other evidence as to the amount or value thereof; the weight of the evidence in such case being for the determination of the jury.

3. Landlord and Tenant—When Landlord's Lien Attaches—Duty of Mortgagee of Personalty to Pay Rent Which is a Lien on—Rights of Unsecured Garnishing Creditor of Tenant.—The lien of a landlord attaches to goods kept for sale by the tenant upon the leased premises as the rent accrues.

When at the time a mortgagee of goods takes possession of them for the purpose of sale under his mortgage, there is rent due the landlord from the tenant (mortgagor) which is a lien on the goods, it is the duty of the mortgagee to pay it out of the surplus of the proceeds of the sale of the mortgaged goods after payment of the mortgage debt; and such payment of the rent will be deducted from such surplus, and the balance thereof will be applied to the payment of an unsecured garnishing creditor of the mortgagor (tenant), pp. 354, 355.

Reaffirmed in Dowie v. Christen, 115 Iowa 366, 88 N. W. 831.

(Note.—See further, Brody v. Cohen, 106 Iowa 309, 76 N. W. 682, sustaining, but not citing the text.—Ed.)

Special cross reference. For further cases citing the text, and others in this connection, see annotations under Grant v. Whitwell et al, (9 Iowa 152), Vol. I, p. 555.

McAFFERTY v. HALE, 24 IOWA 355

1. Written Instruments—United States Revenue Stamp—Power of Deputy Collector to Affix—Admissibility of Instrument in Evidence.—Under the United States Revenue law requiring a stamp to be affixed to certain written instruments, and allowing the collector of revenue or his deputy to affix such a stamp in certain cases, unless the act of the deputy in affixing it and remitting the penalty is authenticated with the official seal of the collector, or it is shown by sufficient evidence *aliunde* that the collector was sick or otherwise unable to act at the time, and that he (the deputy) was authorized for the time-being to exercise the power, the act of the deputy will be treated as a nullity, and the instrument is inadmissible in evidence, pp. 358, 359.

Special cross reference. For cases citing, qualifying and overruling the text, see annotations under McBride v. Doty (23 Iowa 122), ante. p. 87; Hugus v. Strickler (19 Iowa 413), Vol. II, p. 743.

2. Contracts—Written Instrument Evidencing Fact That It Is Void for Want of United States Revenue Stamp—Effect—Parol

Evidence to Establish Contract.—Where a written instrument evidencing a contract is void under the United States revenue law for want of a stamp being legally affixed thereto, the contract is nevertheless valid, and may be proved by parol evidence, if not forbidden by law to be so proved, as contracts within the Statute of Frauds, etc., pp. 359, 360.

Reaffirmed in Leach v. Hale, 31 Iowa 75, 7 Am. Rep. 112.

Cross reference. See further Rule 1 hereof and special cross references here found.

3. Appeal—Reversal as to Cross-Action or Counterclaim.—Where plaintiff recovers judgment in the court below, and the defendant is unsuccessful upon his cross-action, or counterclaim therein, upon an appeal by defendant, the Supreme Court may—under Secs. 3122, 3123 and 3536 of the Code of 1860—reverse the judgment and order a new trial upon the cross action, or counterclaim alone, plaintiff's judgment to remain undisturbed, the court below making the proper order to delay its collection during the pendency of the defendant's claim, p. 362.

Reaffirmed in Sherman v. Hale, 76 Iowa 387, 41 N. W. 49; Schmidt v. Posner, 130 Iowa 349, 350, 106 N. W. 761, under the codes of 1873 and 1897.

McCOLLISTER v. SHUEY, 24 IOWA 362

1. Public Roads and Highways—Establishment of—Statements in Petition and Notice—Substantial Compliance with Statute.—A petition and notice for the establishment of a public road or highway need only substantially comply with the statute in relation thereto.

So a petition and notice for "the appointment of a commissioner to open a road" sufficiently and substantially comply with the Code of 1860 in relation to "the establishment of a county road," pp. 364, 365.

Reaffirmed as to first paragraph in Woolsey v. Board of Supervisors of Hamilton County, 32 Iowa 132; State v. Pitman and Meyertholen, 38 Iowa 253, 254; Stevens v. Cerro Gordo County, 41 Iowa 343, 344; Harris v. Board of Supervisors, 88 Iowa 222, 55 N. W. 325.

Reaffirmed as to first paragraph in Devoe v. Smetzer, 86 Iowa 390, 53 N. W. 289, the case turning on another point.

Distinguished in Lehmann v. Rinehart, 90 Iowa 348, 57 N. W. 866, holding that a petition for the establishment of a public road or highway is insufficient to confer jurisdiction on the board of supervisors, when it contains nothing indicating the relief sought.

2. Public Road or Highway—Notice of Application for Establishment—Presumption as to from Recitals of Record.—Where in a proceeding to establish a public road the county court, upon presenta-

tion of the petition, finds that there has been proper notice given, which finding is entered of record, it is sufficient to show that the court acquired jurisdiction by proper notice, pp. 365, 366.

Reaffirmed and explained in State v. Pitman and Meyertholen, 38 Iowa 254, holding that a recital of record in a proceeding to establish a public road that "due notice of this application having been given," *prima facie* establishes such fact: Holding, also, that a recital of record that "due application of this notice having been given," being a manifest erroneous transposition of the words of the former, has the same effect.

Reaffirmed and extended in Woolsey v. Board of Supervisors of Hamilton County, 32 Iowa 132, holding further that it is proper to prove by parol evidence that the notices were posted, and it will be presumed that due proof in that manner was made to the board, if it be not shown by the record.

Reaffirmed and extended in Carr v. Fayette County, 37 Iowa 609, 610, holding further that where the affidavit as to the posting of notices in a proceeding to establish a public road fails to state that the places where the notices were posted were *public* places, the Supreme Court will, in the absence of a showing to the contrary, presume that other proof of the public character of the places where the notices were posted, was duly made.

Reaffirmed and extended in Larson v. Fitzgerald, 87 Iowa 407, 54 N. W. 442; State v. Minn. & St. L. Ry. Co., 88 Iowa 695-697, 56 N. W. 402, holding further that where the record in a proceeding for the establishment of a highway recites that the court found "that all the requirements of the law were performed," such recital established jurisdiction.

Reaffirmed and qualified in State v. Anderson, 39 Iowa 275, 276, holding that where the record in a proceeding to establish a road fails to show that notice was given, or that the question was decided upon and no extrinsic proof of compliance with the law in this respect is made, the road is not established.

Distinguished in State v. Waterman, 79 Iowa 364, 365, 44 N. W. 678, holding that when the record in a proceeding to establish a public road, refers to an affidavit *alone* as to the proof made as to the posting of the notices, and such affidavit fails to show a compliance with the statute, no presumption arises that other and sufficient proof as to such posting was introduced or considered.

Cross references. See further on this question, annotations under Keyes v. Crawford (19 Iowa 123); State v. Berry (12 Iowa 58), Vol. II, pp. 704, and 10, respectively.

3. *Certiorari—When Lies.*—Under Sec. 3487 of the Code of 1860, the proceedings of an inferior officer or court will not be annulled upon *Certiorari*, except where they are shown to have been illegal, or in excess of proper jurisdiction, p. 369.

Reaffirmed and extended in Everett v. Cedar R. & M. R. R. Co., 28 Iowa 418, holding further that a writ of *Certiorari* is to be heard upon the writ and return, and the court will look *alone* to these for irregularity and illegality in the proceeding sought to be annulled.

Reaffirmed and qualified in Tiedt v. Carstensen et al, supervisors, 61 Iowa 336, 16 N. W. 215, holding—under the Code of 1873—that errors in the decisions of an inferior court or tribunal on questions of fact, cannot be reviewed by the writ of *Certiorari*

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

McNORTON v. AKERS, 24 IOWA 369

1. Attachment—Lost Writ of—Proof of Issuance and Existence of—Presumption as to Form and Seal.—Where an attachment writ is lost, and the attaching creditor proves its issuance and existence, he is entitled to all the rights and benefits he would enjoy were it not lost; and in such case the sufficiency of the writ as to form and seal will be presumed upon proof that it was duly issued by the proper officer; or at least such proof will make a *prima facie* case of its sufficiency, p. 372.

Reaffirmed and extended in French v. Reel, sheriff, 61 Iowa 149, 12 N. W. 576, holding further that the rule applies equally to an officer who justifies under a lost writ of attachment.

2. Replevin—Judgment in.—In an action of replevin the successful party may—under Secs. 3562 and 3563 of the Code of 1860—have judgment for the value of his right in the property, or the value of the property if he is the owner, or he may elect to have judgment for the return of the property, pp. 373, 374.

Reaffirmed and explained in Lillie v. McMillan, 52 Iowa 466, 3 N. W. 603, holding that where one claiming to be the owner of cattle by purchase from an execution debtor, institutes an action of replevin against an officer who has seized them under an execution against the debtor, and takes them from the possession of the officer by execution of a bond for their return, as by law provided, the defendant (officer) who is successful therein may—under Sec. 3241 of the Code of 1873—have judgment for the value of all the cattle, as returned by the jury, although some have died since the plaintiff took possession thereof.

Reaffirmed and extended in Rust v. Olson, 113 Iowa 573, 574, 85 N. W. 800, holding further that where in a replevin action in a justice's court the party found entitled to possession of the property elects to take a money judgment and relinquish all claim to the property, he may remit any part of the value found by the jury which he desires, and take a judgment for the residue, although such *remittitur* and judgment may deprive the unsuccessful party of an

appeal: That Sec. 4110 of the Code of 1897 has no application in this case.

Distinguished in Nichols v. Sheldon Bank, and Charles, 98 Iowa 605, 606, 67 N. W. 583, holding that where a senior mortgagee of personalty brings an action of replevin therefor against a junior mortgagee thereof and a third person who holds possession thereof claiming under and through the junior, and the third person in his answer tenders possession of the property to the plaintiff (first mortgagee), it is the latter's duty to thereupon accept such tender and possession of the property, failing in which he cannot thereafter have judgment against the junior mortgagee for the return of the property, or for its value as found by the jury.

Distinguished and narrowed in Williams v. Chapman, 60 Iowa 58, 59, 14 N. W. 89, holding that Sec. 3241 of the Code of 1860, providing that the person found to be entitled to possession in an action of replevin may, at his option, have judgment and execution for the specific delivery of the property, or for the value thereof as determined by the jury, applies only to a case where the court has jurisdiction to determine who is entitled to the possession of the property, upon the merits; and that when personalty is taken from the possession of one in an action of replevin in a court which has no jurisdiction to so determine such question, the court should order the property to be returned to the person from whom it is so taken, and, upon failure to so do, award execution for its value.

3. Fraud—Evidence to Prove—Great Latitude Allowed.—Great latitude is allowed in the introduction of evidence to prove fraud, p. 374.

Reaffirmed in Presnall v. Herbert, sheriff, 34 Iowa 542; Craig v. Fowler, 59 Iowa 204, 13 N. W. 118.

Reaffirmed and explained in Price v. Mahoney, sheriff, 24 Iowa 584, holding that great breadth of inquiry into the acts of parties concerned and the circumstances attending them, and even declarations after the alleged fraudulent transactions are admissible to show the intent of those charged with *mala fides*.

4. Appeal—Remittitur in Supreme Court—Practice.—Upon appeal to the Supreme Court from a money judgment, the appellee may remit any portion found by the court to be erroneous or unjust, and thereupon the court will enter judgment therein for the proper or just amount, or, at appellee's election, the cause may be remanded to the district court for the entry of such judgment, p. 375.

Reaffirmed and explained in Rowell v. Williams, 29 Iowa 217, holding that upon an appeal to the Supreme Court from a judgment for money, the appellee may remit part of the judgment which is erroneous or unjust, and thus the error will be cured.

FRANS v. YOUNG, 24 IOWA 375

1. Personal Property—Joint Owners—Right to Possession.—Joint owners or joint tenants of personal property have an equal right to the possession thereof, p. 378.

Reaffirmed and extended in Conover v. Earl, 26 Iowa 169, 170, holding further that one joint owner of a chattel or chose in action, cannot maintain conversion against another upon the latter's refusal to deliver the former possession thereof upon demand.—The court saying that the remedy in such case is for partition, or by action in equity.

FOSTER v. BIGELOW, 24 IOWA 379

1. Estoppel in Pais—Failure to Claim or Assert Title to Land.—One who claims title to land under an unrecorded deed, and who without objection or giving notice of his title allows another to purchase and take possession thereof, and erect valuable improvements thereon, is estopped to claim title thereto as against the latter, p. 382.

Reaffirmed in Mathews v. Gilbertson, 83 Iowa 437-441, 50 N. W. 203.

Reaffirmed and explained in Schlawig v. Fleckenstein, 80 Iowa 671, 45 N. W. 771, holding that one who allows another to construct bridges and make improvements on land in reliance upon an adverse title, without protest or objection on his part, cannot thereafter claim title to the land as against the person so constructing the buildings and making the improvements.

Reaffirmed and extended in Peters v. Jones, 35 Iowa 517, 518, holding further that where a father verbally agrees and promises his son to convey certain land to him, on the faith of which the son takes possession of and erects valuable and permanent improvements on the land, such facts will estop the father, his heirs or devisees from thereafter claiming title thereto: And that equity will in such case decree specific performance of the agreement in favor of such son and against the father or his heirs or devisees.

Cross reference. See further on this question, annotations under Lucas v. Hart (5 Iowa 415), Vol. I, p. 364.

McCORMICK v. GRUNDY COUNTY, 24 IOWA 382

1. Contracts—County Warrant—Action on by Assignee.—Where a county warrant is payable to a certain named payee *or order*, and the payee assigns it to another *or bearer*, such assignment and possession of the warrant entitles the latter to sue thereon in his own name, pp. 383, 384.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations and note under King v. Gottschalk (21 Iowa 512), Vol. II, p. 932.

2. Res Adjudicata—Judgment After Notice Held Insufficient, is Not.—Where in an action against several defendants on a written instrument, service of notice as to one of them is held insufficient and is quashed, and he is not again brought into court, a judgment thereafter rendered therein does not constitute *res adjudicata* as to him, pp. 386, 387.

Cited in Melhop & Kingman v. Doane & Co., 31 Iowa 400, 7 Am. Rep. 147, the court holding that in personal actions, if the court has jurisdiction of the subject-matter and of the parties by the service of notice of its pendency, its judgment is binding and conclusive while it remains unreversed, however erroneous: But that it is indispensable to the binding effect of a judgment that the court had jurisdiction of the subject-matter and of the parties; for if the jurisdiction fail as to either the judgment is a mere nullity.

Special cross reference. For further cases citing and sustaining the text, and many others on the question, see annotations under Griffin v. Seymour (15 Iowa 30), Vol. II, p. 299.

BOIES & BARRETT v. VINCENT, 24 IOWA 387

1. Executory Sale of Personal Property—Failure to Deliver—Action for Damages—When Tender of Purchase Price is and is Not Required Before Commencing.—An action for damages for failure to deliver personal property as provided by an executory contract may be maintained by the buyer without first tendering the contract price and demanding performance, when it is shown that at the time of the commencement of the action, the seller had sold the property to another, p. 392.

Reaffirmed and qualified in Wire v. Foster, 62 Iowa 115, 116, 17 N. W. 175, holding that an action for damages for failure to deliver personal property pursuant to an executory contract of sale, cannot be maintained by the buyer, when the property is still in the possession of the seller and no part of the contract price has been paid, without his first tendering the contract price and demanding performance of the contract by the seller.

(Note.—In the present and citing case it does not appear that any definite time for the delivery of the property was fixed by the contracts.—Ed.)

2. Executory Sale of Personal Property—Failure to Deliver—Action for Damages—Measure of.—In an action for damages for failure of the seller to deliver personal property pursuant to an executory contract and when no part of the contract price was paid, the measure of damages is the difference between the contract price and the market value at the time and place fixed by the contract for the delivery.

But where in a contract for the sale of a certain number of cattle, *as a drove*, to be delivered as soon as the seller can get them all together, they being at large and scattered the buyer has a right to wait a reasonable time [in this case a month] for the seller to get the cattle together and deliver them; and if, within such reasonable time, the seller sells and delivers them to another, the measure of damages in an action by the first buyer against the seller for failure to deliver, is the difference between the contract price and the market price at the time of the second sale and delivery, pp. 393, 394.

Reaffirmed as to first paragraph in Wire v. Foster, 62 Iowa 116, 17 N. W. 175.

Reaffirmed and explained in Tuttle-Chapman Coal Co. v. Coal-dale Fuel Co., 136 Iowa 385-387, 113 N. W. 829, holding that where a coal company contracts to sell all coal mined by it during a certain year, the buyer to pay for it by the month at the rate of \$1.10 per ton f. o. b. cars at Coaldale, to be shipped to the buyer at Sioux City, that in an action by the buyer for damages for failure to deliver according to contract, the measure of damages is the difference between the contract price and the market price at Coaldale, and not at Sioux City, the former being the place of delivery.

Reaffirmed, explained and qualified as to first paragraph in La-porte Improvement Co. v. Brock, 99 Iowa 488, 61 Am. St. Rep. 245, 68 N. W. 811, holding that the general rule is that where a contract to deliver goods at a certain price is broken, and the price is not paid before the time for delivery, the proper measure of damages is the difference between the contract price and the market price at the time the delivery should have been made; but that this rule does not apply where the property contracted for, is designed for a special purpose, known to the seller and cannot be readily procured in the market; and that in such latter case, where the seller fails to deliver the property, he is liable for such damages as naturally result from conditions known to him at the time his contract was made.

Reaffirmed and varied as to first paragraph in Harrison v. Charl-ton, 37 Iowa 136, 137, holding that where one purchases all the stock of lumber on a certain lumber yard at a certain price, to be later invoiced and delivered to him, paying no part of the purchase price, the seller not to add new lumber to the stock, that in an action by the seller for the purchase price, the buyer may recover on a counter-claim, the difference between the contract price and the market value of lumber fraudulently added by the seller to the stock before the invoice and delivery.

Reaffirmed and varied as to first paragraph in Cobb, Blasdel & Co. v. I. C. R. Co., 38 Iowa 630, 631, holding further that in an action by the seller of personal property against a common carrier for failing and refusing to transport it to a distant place where it was to have been delivered at a given time, the measure of damages is

the difference in its value at the place where it was offered for transportation, and the contract price for which it was sold, less the freight charges to the place where it was to have been delivered.

Reaffirmed and qualified as to first paragraph in Iowa Brick Mfg. Co. v. Herrick, 126 Iowa 724, 102 N. W. 789, holding that if goods or other personal property are bought to be delivered at a future time, and to be used for specified purposes cannot be bought on the market, a recovery may be had for the reasonable profits lost by a breach of the contract.

MITCHELL v. MOORE, 24 IOWA 394

1. False and Fraudulent Representations Inducing Purchase or Exchange of Lands—Rescission in Equity—Tender Before Bringing Action—Statu Quo.—Where a vendor by material false representations as to the location or quality of land, and known to be false by him at the time he makes them, induces another to purchase it, or to exchange other land therefor, it amounts to fraud, and the latter or purchaser may proceed in equity and obtain a rescission.

Before commencing the action, however, the purchaser should manifest a willingness and ability to the fraudulent vendor to restore to him whatever the former received from the transaction, pp. 396, 397.

Cited with approval in Scott v. Burnight, 131 Iowa 509, 107 N. W. 422, the court holding that an assertion as to values professed to be made upon knowledge of the facts, and made to one known to be ignorant on the subject, especially where aided by an artifice well calculated to deceive, may give rise to an action as for fraud.

Cited in Phelps v. James, 79 Iowa 265, 41 Am. St. Rep. 497, 44 N. W. 543, the court holding that in order to render a party liable in damages in an action at law for false representations as to the character and condition of land which induced the purchase thereof, the falsity of the representations and defendant's knowledge thereof at the time he made them, must be established by proof.

Cited Boddy v. Conover and Henry, 126 Iowa 37, 101 N. W. 447, the court holding that where, in an action at law for damages for false and fraudulent representations as to the quality or quantity of land which induced its purchase, the plaintiff proves that the representations were false, and known to be false by the party making them, an intent to deceive will be implied or presumed; and that in such case it is reversible error for the court to instruct the jury that they must have been made with intent to deceive or mislead.

Distinguished in Brett and Telford v. Van Orken, 99 Iowa 555, 556, 68 N. W. 891, holding that where in an action in equity by the purchaser of land, to rescind the contract and recover the purchase price paid, on the ground of fraud, the proof shows that the vendor

made certain representations as to the quality of the land, and that the purchase was made upon the distinct understanding between the parties that it was upon the faith of the truth of the representations, it is immaterial to plaintiff's right to relief whether or not defendant knew the representations to be false.

Cross reference. See further in this connection, annotations under *Hallam v. Todhunter* (24 Iowa 166), ante. p. 160.

THOMAS v. KENNEDY, 24 IOWA 397, 95 AM. DEC. 740

1. Land—Possession by Husband and Wife—Husband Holding Apparent Legal Title—Notice to Purchaser of Wife's Equity in.—Where the apparent legal title to land is in the husband and the ostensible possession is as much in the husband as the wife, and neither consort does any open or notorious act or acts declaratory of the wife's possession thereof, but on the contrary all acts of control or management of the land are done by the husband and are consistent with his ownership, such joint possession will not operate as notice of the wife's equity or interest in the land, to a purchaser thereof at an execution sale under a judgment against the husband, pp. 401, 402.

Reaffirmed and extended in *Lindley v. Martindale*, 78 Iowa 383, 384, 43 N. W. 234, holding further that the purchaser of real estate takes it charged with notice of the equities of the parties in possession at the time of the purchase; but this possession must appear affirmatively to have been open, visible, exclusive and unambiguous; such as is not liable to be misunderstood or misconstrued.

Cited in *Elliott v. Lane*, 82 Iowa 486, 31 Am. St. Rep. 504, 48 N. W. 721, the court holding that possession of land which will impart notice of title thereto must be adverse, exclusive, open, unequivocal and notorious, and must be inconsistent with the claim of any other person.

Distinguished in *Iowa Loan & Trust Co. v. King*, 58 Iowa 599, 600, 12 N. W. 596, holding that where a woman furnishes the money to buy land, and thereafter resides thereon with her husband, the fact that her son who wrongfully took legal title, boards and lodges with her, does not constitute joint possession thereof by the mother and son, and a mortgagee of the property under a mortgage executed by the son while he is so boarding and lodging, is charged with notice of the mother's equitable title.

Cross reference. See further on this question, annotations under *Dickey v. Lyon* (19 Iowa 544), Vol. II, p. 763.

2. Conveyance of Land—Mistake in Description—Correction by Grantor.—Where equity would compel the grantor in a conveyance of land to correct a mistake in its description, he may voluntarily do that which could be enforced, p. 403.

Cited in McCready v. Sexton & Son, 29 Iowa 381, 4 Am. Rep. 214, the court holding that where a tax deed recites that several parcels or tracts of land were sold in a lump for a gross sum, when they were in fact sold separately, the county treasurer who made the sale may thereafter make a deed or deeds to the tax purchaser correcting the mistake, and that the latter deed or deeds will be valid, under the Code of 1860, and conclusive that the tax sale was made in the *manner* required by law.

3. Judgment Lien on Land—To What Interest It Attaches.—

A judgment lien attaches to the judgment debtor's interest, legal or equitable, in land, but not to the naked legal title, p. 405.

Reaffirmed in Zion Church of the Evangelical Association v. Parker, sheriff, 114 Iowa 8, 9, 86 N. W. 63; Albia State Bank v. Smith, 141 Iowa 257, 258, 119 N. W. 609.

Reaffirmed, explained and varied in Rea v. Wilson, 112 Iowa 519-522, 84 N. W. 540, holding that a prior unrecorded mortgage, which, by mistake, fails to correctly describe the land mortgaged is superior to an attachment subsequently levied thereon.

Reaffirmed and extended in Rider v. Kelso, 53 Iowa 370, 5 N. W. 509, holding further that the lien of a judgment attaches to the lands actually owned by the judgment debtor at the time of its rendition; and that an assignee of a judgment has no better right than his assignor (judgment creditor.)

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross references. See further on this question, annotations under Vannice v. Bergen (16 Iowa 555), Vol. II, p. 472; Welton v. Tizzard (15 Iowa 495), Vol. II, p. 371.

4. Execution Sale of Land—Rights of Purchaser—Grantee in Recorded Deed from Judgment Debtor.—

A purchaser of land from a judgment debtor who, at the time of the rendition of the judgment against the latter, holds under an imperfect or equitable title which is afterwards perfected by conveyance which is placed of record, has the superior right to that of the judgment creditor, or to a purchaser at an execution sale under the judgment, made after the perfected conveyance is recorded, pp. 406, 407.

Reaffirmed and extended in Shoemaker v. Smith, 80 Iowa 661, 45 N. W. 746, holding further—as does the present case in argument—that when a subsequent purchaser of land has knowledge, either from the record or otherwise, of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that which he is about to purchase, and neither inquires nor ascertains the extent of such title, he is guilty of a degree of negligence that is fatal to his claim to be considered a *bona fide* purchaser.

And see 149 Iowa 676, 128 N. W. 1103.

Cross references. See further on this question, annotations under *Vannice v. Bergen* (16 Iowa 555), Vol. II, p. 472; *Welton v. Tizzard* (15 Iowa 495), Vol. II, p. 371.

ROBINSON *v.* BACON & STROHM, 24 IOWA 409

I. New Trial—Discretion of Trial Court—Appeal from Order Granting—Reversal, When.—The trial court has a large judicial discretion in passing upon a motion for a new trial based upon grounds other than those involving purely propositions of law; and upon an appeal in such case from an order granting a new trial, a stronger case of abuse of discretion and resulting prejudice to appellant must be made out to justify a reversal, than upon an appeal where the trial court refused to grant it, p. 411.

Reaffirmed in Tegeler & Co. v. Jones, 33 Iowa 237; *Halpin v. Nelson*, 76 Iowa 428, 41 N. W. 62.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

Cross references. See further on this question, annotations under *Shepherd v. Brenton* (15 Iowa 84), Vol. II, p. 308; *Newell v. Sanford* (10 Iowa 396), Vol. I, p. 712.

MCDANIEL *v.* CHICAGO & NORTHWESTERN RY. CO. 24 IOWA 412

I. Contracts—Conflict of Laws—Lex Loci Contractus—Contracts Limiting Common Carrier's Liability.—Where a contract is made in one state to be performed in another, the law of the latter governs as to its validity, obligation, nature and interpretation, unless the contract is void or illegal where it is made, in which case it will be so held everywhere. But if a contract is made in one state and is to be partly performed therein, the law of the state where it is made, will govern its nature, interpretation, validity and effect.

So where a common carrier contracts to transport cattle from a place in this state to a place in another state, the contract will be governed by the law of this state, and a provision therein limiting the carrier's Common Law liability, being void under Chap. 113, Laws of 1866, will be held void and inoperative, pp. 417, 418.

Reaffirmed and extended as to first paragraph in Nichols & Shepard Co. v. Marshall, 108 Iowa 519-521, 79 N. W. 282, holding further that a note which is void in the state where it is executed and payable, is void everywhere.

Reaffirmed and extended as to second paragraph in Hazel v. Ch. M. & St. P. Ry. Co., 82 Iowa 480, 481, 483, 48 N. W. 926, holding further that a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, is to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country.

Reaffirmed and qualified as to second paragraph in McCoy v. K. & D. M. R. R. Co., 44 Iowa 427; *Grieve v. Ill. Cent. Ry. Co.*, 104 Iowa 663, 74 N. W. 193, holding, under Sec. 1308 of the Code of 1873, and 2074 of the Code of 1897, that in an action for injury to or loss of property received by a common carrier for transportation, the burden of proof is on it to show circumstances excusing or relieving it from liability: Holding, however, that a common carrier is not liable in transporting cattle for injuries which may occur to them because of their own unruliness or viciousness while being transported, or for any injury or damage to them which may be prevented by the use of reasonable care by their owner, if he is in charge of them on the train and is overseeing their transportation; nor is a common carrier liable in damages for any cattle which die by reason of disease or from failing strength on account of poor flesh, in being transported.

Distinguished in Talbot v. Merchants' Despatch Trans. Co., 41 Iowa 250, 251, 20 Am. Rep. 589, holding that where a provision in a bill of lading exempting a common carrier from liability for loss of freight under certain conditions or by certain causes is valid in the state the contract or bill of lading is made, and in the state where the loss of the freight occurs from such a cause or under such a condition, it is valid here, although contrary to the laws hereof.

Cross reference. See further on this question, annotations under Arnold v. Potter (22 Iowa 194) ante. p. 19.

BURDICK v. MOON, 24 IOWA 418

1. Mechanic's or Materialman's Lien—Liability of Wife on Contract of Agent—Husband as Agent of.—A contract by the mechanic or materialman with the agent of the landowner for the performance of the labor or the furnishing of materials, is sufficient on which to base the lien therefor; and a husband may make such contract, when he acts as the agent of his wife who owns the land, p. 419.

Reaffirmed in Bissel v. Lewis, 56 Iowa 235, 236, 9 N. W. 179.

DAVISON & TRUE v. DAVENPORT GAS LIGHT & COKE CO., 24 IOWA 419

1. Principal and Agent—Action on Written Contract Signed by Agent as Principal—Parol Evidence Inadmissible to Charge Principal.—In an action on a written contract signed by an agent as principal and not disclosing the real principal's liability, parol evidence is inadmissible to charge the latter, p. 424.

Reaffirmed and explained in Junge v. Bowman, 72 Iowa 649, 34 N. W. 612; *Osgood v. Bander & Co.*, 82 Iowa 177, 178, 47 N. W. 1003, holding that when a note or other written instrument purports to bind only its signer, he cannot when sued thereon prove by parol that he was acting for another, and that this was so understood at the time of its execution.

Reaffirmed and extended in Ottumwa Mill & Construction Co. v. Manchester, 139 Iowa 338, 115 N. W. 912, holding further that where a written contract creates a liability to a certain person and to no one else, parol evidence is inadmissible in an action thereon, to show that such liability was to another.

(Note.—See further, Chambers v. Brown, 69 Iowa 213, 28 N. W. 561; Watts v. Wis. Cranberry Co., 63 Iowa 730, 18 N. W. 898; Wing v. Glick, 56 Iowa 473, 9 N. W. 917; Bryant v. Branzil, 52 Iowa 350, 3 N. W. 117; Hawkins v. Edwards, 1 Iowa 431, some important cases sustaining, but not citing, the text.

N. B.—Neither fraud, accident or mistake will be found involved in the cases of this note, the rule, or cases under the rule.—Ed.)

Cross reference. See further, Rule 2 hereof.

2. Principal and Agent—Action in Equity Against Undisclosed Principal.—An action in equity may be maintained against an undisclosed principal upon a contract by an agent where the principal receives the benefits thereof.

Such an action may be maintained against an undisclosed principal upon a contract made by an agent within the scope of his authority, p. 424.

Reaffirmed in Watson v. Lovelace, 49 Iowa 562; Steelesmith Grocery Co. v. Potthast, 109 Iowa 417, 80 N. W. 518.

PUTTMAN v. HALTEY, 24 IOWA 425

1. Evidence—Deeds—Proof of Real Consideration.—Parol or other extrinsic evidence is inadmissible to prove the true consideration for a deed, although it be different from that expressed in the instrument, pp. 427, 428.

Reaffirmed in Greedy v. McGee, 55 Iowa 460 (abstract), 8 N. W. 652.

Reaffirmed and explained in Trayer v. Reeder, 45 Iowa 273-275, holding that the recital in a deed as to the consideration, is only *prima facie* evidence thereof, and may be overcome by parol evidence of the real consideration therefor.

Reaffirmed and extended in Dicken v. Morgan, 54 Iowa 686, 7 N. W. 145, holding further that an independent oral agreement which constitutes all or part of the consideration for a written contract or note, may be shown by parol in an action on the latter.

Reaffirmed and extended in Walker v. Walker, 104 Iowa 512, 73 N. W. 1075, holding further that a deed, the consideration of which is an agreement for support of the grantor, may be set aside upon breach of the agreement by the grantee, although a different consideration may be expressed in the instrument.

Cited in *Stewart v. McArthur*, 77 Iowa 168 (dissenting opinion), 41 N. W. 606, the majority court opinion turning upon another point.

Distinguished in *Lewis v. Day*, 53 Iowa 576, 577, 5 N. W. 754, holding that where a deed is made pursuant to a prior written contract, parol evidence is inadmissible to add new conditions or terms to such contract, although they be claimed to be part of the consideration for the contract and deed.

And see 148 Iowa 358, 125 N. W. 873.

Cross references. See further on this question, annotations under *Lawton v. Buckingham, Ex'r* (15 Iowa 22), Vol. II, p. 296.

See, also, annotations under *Gelpcke et al. v. Blake* (15 Iowa 387), Vol. II, p. 355.

MCGREGOR'S EXECUTORS v. VANDEL, 24 IOWA 436

1. Taxation and Revenue—Decedent's Estate—Situs for Taxation of Personal Property of.—Personal property left by a decedent is, as a general rule, to be assessed for taxation in the county wherein he died, if the executor or administrator resides elsewhere: And this rule is not abrogated by Secs. 714 and 716 of the Code of 1860, p. 439.

Cited in *Bank of Albia v. City Council of Albia*, 86 Iowa 31, 52 N. W. 335, not in point.

Cited in *Crawford v. Liddle and Hull, Exr's.* 101 Iowa 155, 70 N. W. 99, not in point.

Distinguished in *Cameron v. City of Burlington*, 56 Iowa 322, 323, 9 N. W. 240, holding that where an administrator is a resident of the same county in which intestate resided at the time of his death, but of a different township, the personal property of the intestate in possession of the administrator is to be assessed for taxation in the township of the administrator's residence, and not in the township or city wherein the intestate died.

Distinguished in *Burns v. McNally*, 90 Iowa 438-440, 57 N. W. 910, holding that—under Secs. 803, 805 of the Code of 1873—where there are two executors, both having actual possession of personal property of the decedent, and both residing in the same county, but in different taxing districts, each should return to the assessor of his township for taxation such personal property of the decedent as may be in his immediate possession in his township, unless the personal property in possession of an executor in his township at the time assessment is required to be made has a fixed and abiding place or location in another township, in which case it is to be assessed in the latter.

2. Taxation and Revenue—Mortgage to Secure Purchase Money of Land.—A mortgage given to secure the purchase money of

land is subject to taxation as property of the mortgagee under the Code of 1860, p. 440.

Reaffirmed in Meyer v. Dubuque County, 49 Iowa 195.

Cited in Cook v. City of Burlington, 59 Iowa 253, 255, 44 Am. Rep. 679, 13 N. W. 114, the court holding that an Act requiring that the property of a corporation be taxed against the corporation, and that the shares of stock representing the property be taxed in the hands of the owners thereof, does not constitute "double taxation," and is Constitutional.

CALLANAN v. SHAW, 24 IOWA 441

1. Trial—Evidence—Witnesses—Witness not Credible, Weight to be Given Testimony.—The evidence of a witness who is not credible, if corroborated and it is not contrary to Reason, ought not to be disregarded, p. 446.

Reaffirmed in Wilson v. Patrick, 34 Iowa 367; Smith v. Grimes, 43 Iowa 365.

2. Trial—Evidence—Witnesses—Witness Testifyng Falsely to Material Fact—When His Whole Testimony to be Disregarded.—Although a witness testify falsely to a material fact, his whole evidence will not be disregarded, unless the false testimony be knowingly and willfully given, pp. 446, 447.

Reaffirmed and extended in Doyle v. Burns, 123 Iowa 505, 99 N. W. 201, holding further that the rule is equally applicable to testimony and sworn statements made by a witness prior to his testimony upon the trial of an action and inconsistent with the latter

3. New Trial—Verdict Against Weight of Evidence as Ground—Evidence Conflicting—Appeal from Order Refusing—Affirmance, When.—Upon an appeal from an order refusing to grant a new trial when the motion was based upon the fact that the verdict was against the weight of the evidence, and the record shows that the evidence was conflicting, a reversal will not be had unless the Supreme Court is clearly satisfied that the trial court abused his discretion in refusing to grant a new trial, and that manifest injustice thereby resulted to appellant, pp. 449, 450.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Newell v. Sanford (10 Iowa 396), Vol. I, p. 712.

4. New Trial—Verdict Excessive—Remittitur to Avoid New Trial—Verdict too Small—Agreement to Larger and Correct Judgment to Avoid New Trial.—If, through mistake or any other cause, a verdict is excessive, the court being satisfied of the fact and of what sum is the just amount to which the plaintiff is entitled, will, in order to do equity and avoid the expense of a new trial to the parties, give the plaintiff his election to remit the excess above the amount

which is justly due him, or to submit to an order setting aside the verdict and directing a new trial. And the same rule applies where, under such circumstances, the verdict is too small, p. 450.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Rule 3 of *Brockman v. Berryhill* (16 Iowa 183), Vol. II, p. 423.

5. Interest and Usury—To What Contracts Usury Statute Applies.—When a contract for the payment of money or property, whatever be the nature of the consideration, directly or indirectly, is made to bear an unlawful rate of interest, or wherein unlawful interest in any way enters, it is usurious, p. 453.

Cited in *Gilmore & Smith v. Ferguson & Cassell*, 28 Iowa 225, (dissenting opinion), the majority court holding that a person may sell his property to another for a certain sum in cash or he may rightfully sell his property to another for a certain sum in money down; or he may ask and receive a much larger sum on condition that it is not paid for till a future day, and the fact that the increased price payable at a future day is more than the legal interest on the cash price, will not make the contract usurious, unless such latter contract is resorted to as a device or cover to evade the usury law, in which latter case it will be usurious.

CITY OF CLINTON v. CEDAR RAPIDS & MISSOURI RIVER R. R. Co., 24 IOWA, 455

1. Municipal Corporations—Streets—Power of Legislature to Grant Railroad Company Right to Construct Railroad Over.—The Legislature may authorize the construction of a railroad over the streets of a city without its consent; and under such an Act a railroad company may so proceed without the consent of the city, and cannot be enjoined by such city from so doing: And an Act for such purpose not requiring such consent, gives the right to proceed without it, pp. 470-474.

Reaffirmed and explained in *Ch. N. & N. W. R. R. Co. v. Mayor of Newton*, 36 Iowa 302, 303; *Ingram, Kennedy & Day v. C. D. & M. R. R. Co.*, 38 Iowa 676; *City of Council Bluffs v. K. C., St. J. & C. B. R. R. Co.*, 45 Iowa 355, 24 Am. Rep. 773, holding—as does the present case—that a railroad company has a right under Sec. 1321 of the Code of 1860, subject to proper equitable control and police regulations, to pass over a street in a city without the consent of the city authorities; and that this right does not depend upon the previous payment to the city of the damages occasioned by such occupation—But see Sec. 464 of the Code of 1873.

Cited in *City of Waterloo v. Un. Mill Co.*, 72 Iowa 439, 34 N. W. 198, the court holding that the right of a city and of the public to the use and occupancy of a *street* is not barred by the statute of

limitation: That the city is but an instrument for the exercise of the authority of the state, and its municipal powers in establishing and maintaining a street are exercised in the discharge of governmental functions; and the statute of limitation, therefore, will not run to defeat the exercise of this governmental authority: Holding, however, that in a case wherein arise questions involving property or contracts which do not pertain to the exercise of a city's governmental authority, the statute of limitation will run.

Special cross reference. For further cases citing and explaining the text, and many others in this connection, see annotations under *Milburn v. City of Cedar Rapids et al*, (12 Iowa 246), Vol. II, p. 40.

FLANDERS v. McCLANAHAN, 24 IOWA 486

1. Land—Action to Correct Description in Deeds and to Quiet Title—Parties.—In an action in equity to correct a description of land in several deeds from several grantors, and to quiet title, the grantors, or, if they are dead, their heirs are necessary parties, pp. 489, 490.

Special cross reference. For cases citing, sustaining and extending the text, and others on the question, see annotations under *Rule 2 of Litchfield v. Polk County* (18 Iowa 70), Vol. II, p. 587.

SMYTH, ADMINISTRATRIX. v. SMYTH, 24 IOWA 491

1. Decedent's Estate—Executors and Administrators—Discovery of Assets Wrongfully Withheld from—Practice.—Secs. 2366, 2367 of the Code of 1860, providing that the county court may summon any person suspected of having taken wrongful possession of any assets, or effects of a decedent, or having them under control, and may subject such person to an examination under oath, etc., authorizes only the examination under oath of such person, and does not justify or allow the introduction of other evidence in behalf of the personal representative, pp. 492, 493.

Reaffirmed in *Rickman v. Stanton*, 32 Iowa 137, 138.

Reaffirmed and explained in *Donover, Adm'r v. Argo*, 79 Iowa 577, 578, 44 N. W. 819, holding—under the Code of 1873—that when the answers under oath and examination of the person charged with having the wrongful possession of assets of a decedent's estate show that he is not the owner of or entitled to the possession or control thereof, the court should order delivery to be made to the administrator [or executor] and provide in the order that upon the party's failure or refusal to comply therewith, if able to so do, he shall be imprisoned until his compliance, as allowed by Sec. 2380 of the Code of 1860.

Reaffirmed and explained in *Barto v. Harrison*, 138 Iowa 418, 419, 116 N. W. 319, holding, also—under Secs. 3315, 3316 of the

Code of 1897—that if it develops in the examination that the title to the property is in dispute, or that there is some controversy as to whether the estate is entitled thereto, then the administrator or executor must be relegated to procedure usually resorted to in order to adjudicate such issues: Holding further that the order in such proceeding is, to the extent authorized, conclusive, if not appealed from and reversed, set aside, or waived and relinquished.

Reaffirmed and extended in Ivers, Adm'r v. Ivers, 61 Iowa 722, 17 N. W. 150, under Secs. 2379, 2380 of the Code of 1873, holding further that the finding of the court upon such proceeding cannot be pleaded in bar of an action by the administrator to recover the property of the estate.

2. Same—Proceeding Against Wife of Decedent—Wife May be Compelled to Testify.—The proceeding mentioned in Rule 1 hereof may be had against the wife of a decedent, and she may be compelled to testify: Secs. 3980, 3982 of the Code of 1860, are not applicable thereto, p. 493.

Cited in Shafer v. Dean, 29 Iowa 145, the court holding that the wife of a party may testify as to facts transpiring during the lifetime of a decedent, where the adverse party is an executor.

PETERSON v. MISSISSIPPI VALLEY INS. CO., 24 IOWA 494, 95 AM. DEC. 748.

1. Fire Insurance—Policy on Livestock—Horses—Liability of Company for Loss.—Where a fire insurance policy is issued on a certain number of horses situated on a certain section of land in a certain township and range, the company is liable, in the absence of an express provision in the policy to the contrary, for the loss of any of the number by fire, either while on the farm or section, or while temporarily away in usual and ordinary use, p. 498.

Reaffirmed in Mills v. Farmers' Ins. Co., 37 Iowa 401; Cottrell v. Munterville Mut. F. & Lightning Ins. Ass'n, 145 Iowa 653, 124 N. W. 613, holding that the rule is equally applicable to fire and lightning policies.

Reaffirmed and explained in McCluer, v. Girard Fire & Marine Ins. Co., 43 Iowa 352, 353, 22 Am. Rep. 249, holding that a fire insurance policy on a phaeton *contained in* a certain barn, renders the company liable for its loss by fire while in a carriage shop to be repaired.

Cited in Mickey v. Burlington Ins. Co., 35 Iowa 178, 14 Am. Rep. 494, the court holding that the temporary removal of a stove pipe at the time that the stove is not in use, is not a breach of the covenants of a fire insurance policy on a dwelling requiring the insured to keep the stove and pipe well secured.

Distinguished and narrowed in Lakings v. Phoenix Ins. Co., 94 Iowa 478-480, 28 L. R. A. 70, 62 N. W. 783, holding that when a fire insurance policy insures certain property as "situated (except as otherwise provided) on and confined to premises actually occupied by the assured," describing the premises, the company is not liable thereunder for a loss of the property occurring elsewhere—Especially, says the court, when the loss occurs while the property was being used at an unusual distance from the place where it should have been kept.

Cross reference. See, also, on this question, Lathers v. Ins. Co., 22 L. R. A. (New Series), 848.

HUGHES v. MONTY, 24 IOWA 499

1. **Trial—Instructions—Assumption of Fact in, When Not Error.**—It is not error for an instruction to assume a fact as true, when it is not denied, and there is no error in relation thereto, p. 501.

Reaffirmed and explained in Hall v. Town of Manson, 90 Iowa 489, 58 N. W. 882, holding that it is not error for the court in an instruction, to assume a fact as true, about which there is no conflict, and which is fully established by the evidence.

Unreported citation, 73 N. W. 1101.

Cross reference. See further on this question, annotations under Rule 5 of Russ v. Steamboat War Eagle (14 Iowa 363), Vol. II, p. 247.

2. **Garnishment—Maker of Negotiable or Assignable Paper—Liability as Garnishee.**—Under Sec. 3211 of the Code of 1860, judgment cannot be entered against a garnishee on a debt evidenced by negotiable or assignable paper, unless it is delivered, or he is fully exonerated, or indemnified from liability thereon, after he may have satisfied the judgment, p. 502.

Distinguished in Nordyke v. Carlton, 108 Iowa 418, 419, 79 N. W. 137, holding—under Sec. 2990 of the Code of 1873—that a promissory note is subject to levy under an attachment—under the Code of 1873—by the sheriff taking manual possession thereof: And that such an attachment and levy in this state is superior to a subsequent garnishment of the debt evidenced by the note in another state.

3. **Garnishment—Garnishee Not to Pay Money to Debtor Until Discharged.**—Until a garnishee's answer is disposed of and an order is made for his discharge, he has no right to pay or deliver the money or property subject to the garnishment to his creditor, and if he does so it is at his own risk, p. 503.

Reaffirmed and explained in Bowen v. Port Huron Engine & Thresher Co., 109 Iowa 258, 259, 77 Am. St. Rep. 539, 47 L. R. A. 131, 80 N. W. 346, holding that from the time of the service of notice the garnishee is liable to plaintiff for the value of all of defendant's property in his hands, subject to execution, and to the amount of

all debts owing by him to defendant at time of service: Holding, also, that the legal effect of the garnishment judgment is to sequester or set aside the property or money in the hands of the garnishee to the payment of plaintiff's judgment; and that in such case the garnishing creditor must collect his debt under the judgment against the garnishee if it be sufficient, and the latter be solvent at the time the judgment is rendered; and such judgment against a solvent garnishee operates as a satisfaction of the debt garnished to the extent thereof.

OLMSTEAD *v.* IOWA MUTUAL INSURANCE CO., 24 IOWA 503

1. Fire Insurance—Condition in Policy Against Incumbrance on Property—Undelivered Mortgage Is Not.—An undelivered mortgage on insured property is not an incumbrance, and does not vitiate or render void a policy of fire insurance thereon, containing a condition that in case "an incumbrance fall or be executed upon the property insured, the policy shall be void until consent of the company is had thereto," p. 504.

Special cross reference. For cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 2 of Ayres *v.* Hartford Fire Ins. Co. (17 Iowa 176), Vol. II, p. 513.

SCHRIMPER *v.* HEILMAN, 24 IOWA 505

1. Appeal—Verdict Against Weight of Evidence—Evidence Conflicting—Affirmance.—Where the trial court refused to grant a new trial on a motion based upon the ground that the verdict was against the weight of the evidence, and the record upon appeal shows that the evidence was conflicting merely, the order below will be affirmed, p. 506.

Reaffirmed in Clear *v.* Reasor, 29 Iowa 329; Wesley *v.* Jacobs, 38 Iowa 575.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

2. Slander and Libel—Evidence—Malice—Repetition of Slanderous Words Admissible to Show.—For the purpose of proving malice on the part of defendant it is competent to prove in an action for slander, that the defendant republished or repeated the slanderous words after the institution of the action, p. 506.

Reaffirmed and explained in Prime *v.* Eastwood, 45 Iowa 642; Halley *v.* Gregg, 74 Iowa 564, 38 N. W. 416, holding that in order to make a repetition of slanderous words competent to prove malice in an action for slander, it is not necessary to specially plead such fact of repetition—The last case holding that if it be so specially pleaded, allegations concerning it may be stricken on motion.

Reaffirmed, explained and extended in Hinkle *v.* Davenport, 38 Iowa 361, 362, holding further that when such evidence is admitted,

the jury should be instructed that it is for the purpose of proving malice, and is not to be considered to enhance damages.

Reaffirmed and extended in Bailey v. Bailey, 94 Iowa 660, 63 N. W. 341, holding further that in an action for slander, repetitions by the defendant of the slanderous words of a similar import, whether before or after the speaking or publication of the words complained of, are admissible to prove malice of the defendant.

Cross reference. See further on this question, and in this connection, annotations under Beardsley v. Bridgman (17 Iowa 290), Vol. II, p. 529.

GOHEGAN v. LEACH & CO., 24 IOWA 509

1. Duress—Conveyance by Wife to Prevent Husband Being Prosecuted for Crime—Conveyance Set Aside in Equity—Statu Quo.—Where a wife is induced to execute a conveyance to her realty under fears of the prosecution of her husband for a crime, and in order to prevent it, such facts will constitute duress; and the instrument will be set aside in equity. But if, in such case, the crime charged against the husband be that of the larceny or embezzlement of the grantee's money, and it appears that the husband made improvements on the wife's realty conveyed, with a portion thereof, the grantee will be adjudged a lien on the realty to the value of the improvements made by his money; and if the grantee at the time of the execution of the conveyance assumed or agreed to pay any debts or liens on the property, he will be entitled to a lien thereon for the amount thereof actually paid by him, upon the setting aside of the conveyance, pp. 511, 513.

Reaffirmed and explained in Giddings v. Iowa Sav. Bank of Ruthven, 104 Iowa 679, 680, 74 N. W. 22, holding that where the fears or affections of a wife are worked upon through threats made against her husband, and she is induced thereby, against her will, to convey her property to secure his debt, there is duress as to her, even though the debt was valid, and the threat was of lawful prosecution for a crime that had in fact been committed by the husband.

(Note.—See further, First Nat'l Bank of Nevada v. Bryan, 62 Iowa 44, 45, 17 N. W. 166; Green & Densmore v. Scranage, 19 Iowa 461, 87 Am. Dec. 447, important cases on this question not citing the text.—Ed.)

SHERMAN v. WESTERN STAGE CO., 24 IOWA 515

1. Limitation of Actions—Action for Death or Wrongful Act or Negligence—When Statute Commences to Run—An action by an administrator for damages by reason of the death of his decedent caused by the wrongful or negligent act of defendant, where the act

causing the death was done within a few minutes of the decedent's death, is not barred until two years after the appointment of the personal representative, pp. 552-554.

Cited in Nord v. B. & M. Riv. R. R. Co., 37 Iowa 499, the court holding that an action for personal injury resulting from negligence is barred under Sec. 2740 of the Code of 1860, unless commenced within two years after the injury is received.

Cited in Sachs, Adm'r, v. Sioux City, 109 Iowa 226, 80 N. W. 336, the court holding that where one injured by a defective bridge in a city, lives three months thereafter and fails to give the notice required by Chap. 25, Acts of Twenty-second General Assembly, (1888) as amended by Chap. 63, Acts of Twenty-sixth General Assembly, (1896) he loses his right to recover therefor, and, upon his subsequent death his personal representative cannot maintain an action therefor.

Overruled in Kellow, Jr., Adm'r, v. Cent. Iowa Ry. Co., 68 Iowa 481-486, 56 Am. Rep. 858, 27 N. W. 466, holding that when the wrongful or negligent act and the death are not absolutely instantaneous, and there is any appreciable time, however short, between the act and the death, the cause of action *accrues* to the decedent, and *survives* to the administrator, and the action must, under the Code of 1873, be commenced within two years from the doing of the act.

2. Limitation of Actions—When Statute Commences to Run, Suspension of, etc.—Common Law Not Abrogated.—Our Statute of Limitation has not abrogated the Common Law rules that the Statute begins to run from the time the cause of action accrues; that if the statute once begins to run, no subsequent disability will suspend it, unless the statute itself provides therefor; and that before a cause of action accrues, or the statute can begin to run, there must exist a cause of action and a person authorized to prosecute it, p. 553.

Cited in Mead v. Ill. Cent. R. R. Co., 112 Iowa 295, 83 N. W. 980, the court holding that, under Sec. 3447 of the Code of 1897, actions for the recovery of real property must be brought within ten years from the time the cause of action accrues.

Cited in McNeil v. Sigler, 95 Iowa 590, 64 N. W. 605, the court holding that under the Code of 1873, an action on a promissory note where the payee and holder thereof becomes insane before its maturity, the cause of action thereon is barred, unless commenced within one year after the termination of such disability, or the death of the insane payee.

3. Torts—Negligence—Contributory, or Mutual Negligence, When Bars Recovery.—No one can recover for an injury of which his own negligence was in whole or in part the proximate cause.

Where there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained, pp. 557-560.

Reaffirmed in Portman v. City of Decorah, 89 Iowa 337, 338, 56 N. W. 512; Rich v. Moore, 114 Iowa 82, 86 N. W. 52.

Reaffirmed and extended in Atkins v. Ellis, 118 Iowa 78; 91 N. W. 829, holding further that the doctrine of comparative negligence does not prevail in this state.

Special Cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 5 of Donaldson et al, Adm'rs, v. Miss. & Mo. R. R. Co. (18 Iowa 280), Vol. II, p. 627.

Cross references. See further on this question, annotations under Haley, Adm'r, v. Ch. & N. W. Ry. Co. (21 Iowa 15), Vol. 2, p. 867; Hoben v. B. & M. Riv. R. R. Co. (20 Iowa 562), Vol. II, p. 861.

4. Death by Wrongful Act or Negligence—Who to Bring Action for.—Under Sec. 4111 of the Code of 1860, an action for damages for death of one caused by the wrongful act or negligence of another, accrues to the estate of the deceased, and must be brought by his personal representative, pp. 543, 544.

Reaffirmed in Mowry v. Chaney, 43 Iowa 611.

Cited in Stulmuller, Adm'r, v. Cloughly, 58 Iowa 741, 13 N. W. 56, the court holding that in an action by an administrator, for the death of a married woman caused by wrongful act or negligence, the damages to be recovered are such as would have accrued to her estate by reason of her death had she been unmarried.

Special Cross reference. For further cases citing and sustaining the text, and many others on the question, see annotations under Donaldson et al, Adm'rs, v. M. & M. R. R. Co. (18 Iowa 280), Vol. II, p. 627.

5. Appeal—Excessive Damages—Remittitur.—Upon an appeal to the Supreme Court from a judgment for damages, the court may, upon being satisfied that the judgment is excessive and upon the plaintiff offering to remit any portion thereof found excessive, order that the plaintiff remit all thereof except a certain sum, and accept a new judgment for the latter, and that upon his refusal or default, the judgment will be reversed, p. 569.

Cited in Collins v. City of Council Bluffs, 32 Iowa 331, 7 Am. Rep. 200; Allender v. C. R. I. & P. R. R. Co., 43 Iowa 282; Belair v. C. & N. W. R. R. Co., 43 Iowa 676, the court holding that a verdict for damages will not be disturbed as excessive, upon appeal, unless it is so flagrantly excessive as to raise a presumption that it was the result of passion, prejudice or undue influence, and not the result of an honest exercise of the judgment and the lawful discretion of the jury.

STATE v. VINCENT, 24 IOWA 570, 95 AM. DEC. 753

1. Murder—Res Gestae—Conversations and Statements of Deceased.—Upon the trial of a person accused of the murder of a companion on a journey, statements of the deceased as to where they came from and where they were going, are admissible as part of the *res gestae* although made in the absence of accused.

So, also, conversations by deceased with a third person in the presence of accused, are competent as such evidence, pp. 573, 574.

Cited in State v. Kuhn, 117 Iowa 225, 90 N. W. 735, the court holding that upon the trial of a wife accused of the murder of her husband by poison, statements of the deceased in her absence, that she had poisoned him, are competent as part of the *res gestae*.

2. Trial—Evidence—Impeached Witness Cannot be Supported by Previous Consistent Statements—Exceptions to Rule.—As a general rule when the credibility of a witness is impeached by direct testimony of his want of reputation for truth, or his general moral character, or by proof of his having made or testified to different and conflicting statements, he cannot be supported by evidence that statements of the facts made by him before the trial correspond with his evidence.

But this general rule admits of an exception if the witness is charged with a design to misrepresent on account of his changed relation to the parties or the cause, then evidence of like statements before such change of relation may be admitted; or if it is attempted to be shown that the evidence is a recent fabrication, or when long silence concerning an injury is construed against the injured party, as in cases of an indictment for rape, in such cases it is proper to show that the witness made similar statements soon after the transaction in question, pp. 574, 575.

Reaffirmed and explained as to second paragraph in Boyd v. First Nat'l Bank of Oskaloosa, 25 Iowa 257, holding that declarations of a witness are admissible where it is claimed that his relation to the case, or parties interested discredits him, or, on account of such relations he designedly makes false statements, and it is shown that the declarations, agreeing with his evidence, were made before such relations existed.

Reaffirmed and extended in Kesselring v. Hummer, 130 Iowa 149, 150, 106 N. W. 502, holding further that where a party seeks to introduce proof of previous consistent statements of his impeached witness he must, in order to render them competent, show that they are admissible as within one of the exceptions mentioned in the text.

3. Homicide—Evidence of Medical Experts.—Upon the trial of one for homicide where it appeared that the head of the deceased was severed from the body when he was killed and later preserved in alcohol, and witnesses identified the head as that of de-

ceased, the accused could prove by physicians and surgeons that on account of natural and inevitable changes such identification was not possible.

In such case it would have been competent for the witnesses to have stated the character and nature of the change in the human body produced by death within certain periods of time, and to have explained or illustrated to what extent these changes had operated upon the head of the deceased; and to have stated their usual and necessary effect according to the laws of Nature: That the progress of decay, the distortion and discoloration of the features, and the consequent change or destruction of the peculiar expression of the countenance by which human faces are usually distinguished and identified, as shown by the head in question, would have been proper facts for the witnesses to have pointed out and explained to the jury, pp. 576, 577.

Cited in State v. Morphy, 33 Iowa 272, 11 Am. Rep. 122, the court holding that upon the trial of an indictment for homicide, testimony of medical men is admissible as to the instruments producing and the nature of the wounds, the cause of a disease or the consequences of wounds.

4. Homicide—Corpus Delicti—Proof of by State—Contrary Proof by Accused—Alibi—Burden and Sufficiency of Proof.—Where upon the trial of an indictment for homicide where the State introduces evidence tending to prove that the deceased was murdered, and identifying the body, and the accused claims that after the time of the alleged murder the deceased was seen alive, and that the body found is not his body, the burden is on the accused to prove his hypothesis by proof sufficient to outweigh that given to sustain the contrary one of the State.

And this is the rule where the accused interposes an alibi as a defense, p. 578.

Reaffirmed and explained as to second paragraph in State v. Hardin and Henry, 46 Iowa 629, 26 Am. Rep. 174; State v. Northrup, 48 Iowa 587, 30 Am. Rep. 408; State v. Red, 53 Iowa 70, 71, 4 N. W. 832; State v. Kline, 54 Iowa 185, 186, 6 N. W. 186; State v. Hamilton, 57 Iowa 598, 11 N. W. 6, holding that where the accused interposes an alibi as a defense, the evidence sustaining it must outweigh the proof tending to establish its contradictory hypothesis; but that a bare preponderance of the evidence is sufficient therefor.

SIZE v. SIZE, 24 IOWA 580

1. Decedent's Estate—Homestead of Decedent Husband—Right of Wife in—Rights of Heirs.—Where a husband dies seized of the fee simple title to homestead, and leaving a widow and issue, the homestead descends to the heirs at law, subject to the right of

the widow to use and occupy it as homestead: And in such case the widow has no right to sell or convey the fee simple title to the homestead; and such acts on her part constitute an abandonment, and entitle the heirs at law to maintain an action for partition thereof, p. 581.

Special Cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under *Burns v. Keas* (21 Iowa 257), Vol. 2, p. 900.

PRICE *v.* MAHONEY, SHERIFF, 24 IOWA 582

1. **Fraud—Fraudulent Transactions—Evidence—Wide Latitude Allowed.**—Great breadth of inquiry into the acts of parties concerned, and the circumstances attending them, and even declarations after the alleged fraudulent transactions, are admissible to show the intent of those charged with *mala fides*, p. 584.

Special Cross reference. For cases citing and sustaining the text, see annotations under Rule 3 of *McNorton v. Akers* (24 Iowa 369), ante. p. 200.

2. **Trial—Instructions Tending to Mislead, Reversible Error.**—Instructions which are so framed as that they might probably have misled the jury, constitute reversible error, p. 584.

Reaffirmed in *Williamson v. Reddish*, 45 Iowa 553.

Reaffirmed in *Brown v. Bridges*, 31 Iowa 143, holding that upon appeal all instructions given will be considered together; but that if, as a whole, they present a conflict, or might have tended to mislead the jury, they will be ground for reversal.

Reaffirmed and extended in *Gamble v. Mullin*, 74 Iowa 100, 101, 36 N. W. 910, holding further that upon a jury trial it is the duty of the judge, whether requested or not, to so instruct the jury that they will clearly and intelligently know the precise points which they are to decide; and his failure to so do, if resulting in prejudice to the substantial rights of or injustice to either party, will be reversible error.

Cited with approval in *Almond v. Nugent*, 34 Iowa 305, (Concurring opinion), 11 Am. Rep. 147, the majority opinion turning upon other questions.

CORNING *v.* FOWLER, 24 IOWA 584.

1. **Husband and Wife—Husband Making Improvements on Wife's Land—Rights of His Creditors.**—Where a husband who is insolvent voluntarily makes improvements on his wife's land with his money or means, and with the knowledge of his wife, but without a fraudulent intent participated in by her, neither he nor his creditors can assert any lien thereon, or subject the land to the amount of the money or means which made the improvements, pp. 586, 587.

Reaffirmed and extended in Shircliffe v. Casebeer, 122 Iowa 620, 621, 98 N. W. 487, holding that an insolvent husband may use his time, talents, labor and skill in conducting and managing a business owned by his wife without subjecting any of the profits thereof, or its enhanced value, to the satisfaction of debts of his creditors—Holding further that this is not to be construed as in any sense an abandonment of or departure from the well established rule that business transactions between an insolvent husband and his wife will be closely scrutinized when questioned by his creditors, and, if it be found that the wife holds the title to property as a mere trustee for the use of the husband, or as a mere device by which property secretly owned by the husband may be placed beyond the reach of process at the suit of his creditors, equity will decree its subjection to their claims.

Cited in Second Nat'l Bank of Rockford v. Gaylord, 66 Iowa 584, 24 N. W. 57, the court holding that a wife may purchase realty and pay a portion of the purchase price with her own funds, relying on paying the balance thereof by a sale of a portion at an advanced price; and that such land will not be subject to the satisfaction of debts of her husband: Holding further that a husband may aid his wife to procure title to real estate, and it will not thereby be subjected to the satisfaction of his debts, provided he does not furnish any of the means to pay therefor.

Cited in Ebersole v. Moot, 112 Iowa 598, 599, 84 N. W. 696, not in point.

Distinguished in Hamilton v. Lightner, 53 Iowa 473, 474, 5 N. W. 606, holding that property acquired by the wife by the use of the husband's means, or those which the law recognizes as his, to the prejudice of his creditors, will be subjected in equity to the latter's demands; and the transactions by which the property was so acquired will be treated as fraudulent in equity.

Distinguished and narrowed in Croup & Shafer v. Morton, 49 Iowa 19, 20, (cited in dissenting opinion, 24); 53 Iowa 606, 607, 5 N. W. 1099, holding that when a wife purchases homestead and pays part of the purchase price, and her husband who is insolvent pays the balance of the purchase price, an antecedent creditor may, in equity, subject the land to the satisfaction of his debt, to the amount of the purchase money paid by the husband.

MCCALEB v. SMITH, 24 IOWA 591

(Abstract.)

1. **Appeal—General Exceptions to Instructions or Charge of Court Given to Jury—When no Ground for Reversal.**—General exceptions to the instructions, or the charge of the court given to the jury, when some of them or some part thereof are or is correct,

will not authorize the Supreme Court to review specific errors therein, p. 591.

Reaffirmed in Ruter v. Fay, 46 Iowa 133; Moore v. Gilbert, 46 Iowa 509; King v. Lyman, 46 Iowa 703 (abstract); Pitman v. Molsberry, 49 Iowa 339, 340; Hallenbeck & Son v. Garst, 96 Iowa 511, 65 N. W. 417; Rowen, Adm'r, v. Sommers, 101 Iowa 735, 736, 66 N. W. 897; Ludwig v. Blackshere, 102 Iowa 371, 71 N. W. 357.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 5 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), Vol. II, p. 140.

HOBBS v. BRAYTON, 24 IOWA 596

(Abstract.)

1. Statute of Frauds—Verbal Contract for Adjustment of Liens on, or Purchase of Land—Testimony of Person Sought to be Bound Takes Cases out of.—Where a verbal contract for the adjustment of liens of land, or for the purchase thereof, is proved by the testimony of the person sought to be bound, it is taken out of the Statute of Frauds, by Sec. 4010 of the Code of 1860, p. 598.

Special Cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Rule 2 of Auter v. Miller (18 Iowa 405), Vol. II, p. 656.

Annotations to Decisions Reported in Volume 25 Iowa

HESS *v.* FOCKLER, 25 IOWA 9

1. **Evidence—Witnesses—Competency—Slanderous Words, Plaintiff May Testify to.**—Under Sec. 3978 of the Code of 1860, the plaintiff is a competent witness in an action for slander; and the publication of the defamatory words may be proved by his testimony alone, p. 11.

Cited in Shafer *v.* Dean, 29 Iowa 145, not in point.

2. **Slander and Libel—Evidence—Sense in Which Words Understood by Hearers—When Unnecessary to Prove.**—In an action of slander where there exists a doubt as to the sense in which the alleged slanderous words were understood, a witness to whom they were published may testify thereto; but when the meaning is clear this may be determined by the jury from the words themselves and the facts and circumstances attending their speaking, without such proof, pp. 11, 12.

Reaffirmed, and explained in McLaughlin *v.* Bascom, 38 Iowa 661, holding that in an action of slander where the words spoken are ambiguous, they are to be construed in the sense in which the hearers understood them; and such fact may be proved by such persons, and is an ultimate fact to be determined by the jury.

Reaffirmed, explained and extended in Quinn *v.* Prudential Ins. Co., 116 Iowa 526, 527, 90 N. W. 350, holding that (under Sec. 3592 of the Code of 1897) a petition in an action of slander or libel need only state the defamatory sense in which the language was used, and that it was spoken of and concerning the plaintiff: That the innuendo is properly employed, only where the slanderous or libelous words are ambiguous, of doubtful meaning, or where by reason of extrinsic facts and circumstances, they express a hidden or unusual meaning: That where an innuendo is not so properly employed, or is not so required, the meaning of the words complained of cannot be thereby enlarged or restricted.

Cross references. See further on this question, annotations under Rules 1 & 2 of Kinyon *v.* Palmer (18 Iowa 377); Rules 1 & 2 of Barton *v.* Holmes (16 Iowa 252), Vol. II, pp. 651, and 432, respectively.

TOWN OF DECORAH *v.* BULLIS, 25 IOWA 12

1. Municipal Corporations—Act of March 23, 1858—To What Cities and Towns Applicable—Retroactive Statutes.—The Act of March 23, 1858, in relation to cities and towns, does not apply to those organized prior to the taking effect thereof, or to those organized under special charters, unless they adopt the provisions thereof, or unless as therein specially provided, p. 15.

Cited in State *v.* Squires, 26 Iowa 348, the court holding that statutes will be construed as having a prospective operation, unless a clear retrospective intention is thereby shown: Holding further that the General Assembly may by law cure a defect in irregular proceedings, although such proceedings may be void, but for the curative Act—Provided no vested rights are thereby disturbed.

Cross reference. "Constitutional Law—Retropective Statutes—Curative Acts"—See annotations under Rule 2 of Brinton *v.* Seevers (12 Iowa 389), Vol. II, p. 64.

HOLLIDAY *v.* ARTHUR, 25 IOWA 19

1. Mortgage—Deed Absolute on Face—When Treated as Mortgage in Equity—Redemption.—Even though a deed to land is absolute on its face, yet if it was in fact executed as a security for the grantor's indebtedness it will be treated in equity as a mortgage, and the grantor will be allowed to redeem therefrom upon the payment of the debt and interest, p. 19.

Cited with approval in Spurgin *v.* Adamson, 62 Iowa 665, 666, 18 N. W. 295, the case turning on the right of a junior lienholder, or purchaser of land to redeem from a prior mortgage thereon, how the redemption is to be made, and other matters intimately connected with the text.

ST. JOHN *v.* WALLACE, 25 IOWA 21

1. Appeal—Bill of Exceptions—Time for Settling and Signing—Extension of Time Beyond Term, etc.—By-standers Bill.—A bill of exceptions must be settled and signed at the term at which the verdict was rendered, unless a longer time be agreed upon by the parties and fixed by the court therefor: And in this latter case a party cannot have the bill signed by the judge after the time fixed, unless he shows that he made proper effort to have it signed within the time allowed; nor will he stand in a better position if a bill is so signed by two by-standers, p. 24.

Reaffirmed and narrowed in Harrison *v.* Charlton, 42 Iowa 576, the court holding that a bill of exceptions may—under Sec. 2831 of the Code of 1873—be settled and signed after the adjournment of the term at which the verdict was rendered, if it is done by agreement of the parties and within the time agreed upon.

Reaffirmed and narrowed in Lloyd v. Beadle, 43 Iowa 661, holding that—under Sec. 2831 of the Code of 1873—time to settle and sign a bill of exceptions cannot be extended beyond the term at which the verdict was rendered, without the agreement of the parties, and most especially against one party's objection; and that this rule applies to the granting of additional time therefor beyond that fixed by agreement of the parties: And that a bill of exceptions settled and signed contrary to this rule will be disregarded upon appeal.

Reaffirmed and narrowed in State v. Newcomb, 56 Iowa 336, 337, 9 N. W. 291, holding that under the Code of 1873, a bill of exceptions, or the certificate of evidence taking its place, must be settled and signed at the term at which the verdict was rendered, or within the time fixed therefor by order of court, or it will be disregarded upon appeal: And that this rule applies to civil and criminal cases alike.

Reaffirmed and narrowed in Hahn v. Miller, 60 Iowa 98, 14 N. W. 120, holding that under the Code of 1873, Sec. 283, a bill of exceptions must be filed during the term at which the verdict or judgment is rendered or within such time thereafter as the court may fix; but in no case shall the time extend more than thirty days beyond the term, except by consent of the parties, or by order of court: Holding further that extension of time for the settling of a bill of exceptions, correspondingly extends the time for its filing.

Reaffirmed and narrowed in McFarland v. Folson & Co., 61 Iowa 118, 119, 15 N. W. 864, holding that—under the Code of 1873—a bill of exceptions, or certificate of the trial court of the evidence must be filed within the time fixed by the trial court's order, or it will be disregarded or stricken from the record: Holding also that when an order fixes a time beyond the term to file a bill of exceptions, or certificate of the evidence corresponding thereto, it will be presumed to have been done by consent or agreement of the parties, unless the record shows the contrary.

Distinguished in State v. Taylor, 103 Iowa 25-27, 72 N. W. 418, holding that under the Code of 1873, when time is extended beyond the term in which to file, settle and sign a bill of exceptions, that a party has three clear days after the refusal of the trial judge to sign it as presented, if presented within the time fixed, in which to prepare a by-standers' bill.

CURL v. WATSON, 25 IOWA 35, 95 AM. DEC. 763

1. Tax Sale of Land—Action in Equity to Redeem from—Tender before Commencing—Keeping Tender Good—Costs.—Before bringing an action to redeem from a sale of land for taxes, the plaintiff [in this case minor heirs of a decedent land owner] must tender the amount due the tax purchaser for the taxes paid by him,

and such tender must be kept good in the action, failing which the costs of the action will be taxed to the plaintiff, p. 38.

Reaffirmed in Corning Town Co. v. Davis, 44 Iowa 634.

Unreported Citation, 17 N. W. 661.

2. Tax Sale of Land—Redemption from by Person Having an Interest in—Whole to be Redeemed.—Where a party by reason of owning any interest in the land sold for taxes, has a right to redeem, he may redeem the whole, and the purchaser may require him to redeem the whole, if any, p. 39.

Reaffirmed in Stout v. Merrill, 35 Iowa 60.

Special Cross reference. For further cases citing and explaining the text, and many others on the question, see annotations under Rule 3 of Burton v. Hintrager (18 Iowa 348), Vol. II, p. 642.

Cross reference. See further on this question, annotations under Adams v. Beale (19 Iowa 61), Vol. II, p. 692.

COTTON v. WOOD, 25 IOWA 43

1. Resulting Trust—Land Paid for by One, Title Taken by Another—Parent or Husband Furnishing Purchase Money—Presumption as to Advancement—Burden of Proof.—Where, upon the purchase of land, the consideration is paid by one, and the legal title conveyed to another, a resulting trust is thereby raised, and the person named in the deed will hold the property as trustee of the party paying the consideration.

But if the person to whom the conveyance is made be one for whom the party paying the consideration is under obligation, natural or moral, to provide, the transaction will be regarded *prima facie*, as an advancement, and the burden will rest on the one who seeks to establish the trust for the benefit of the payer of the consideration, to overcome the presumption in favor of the legal title, by sufficient evidence, pp. 45, 46.

Reaffirmed in Hagan v. Powers, 103 Iowa 598, 599, 72 N. W. 773.

Reaffirmed as to second paragraph in Wood v. Broliar, 40 Iowa 593; Culp v. Price, 107 Iowa 135, 136, 77 N. W. 849; Burkhardt v. Burkhardt, 107 Iowa 374, 77 N. W. 1071; Hoon v. Hoon, 126 Iowa 393, 102 N. W. 105.

Reaffirmed and explained in Paige v. Paige, 71 Iowa 325, 326, 60 Am. Rep. 799, 32 N. W. 364, holding that where land is paid for with partnership funds, a trust results in favor of the firm, in whatever name the title is taken; that such a trust may be proved by parol: And that where land is so purchased to be used for partnership purposes it will be treated as personal assets of the firm.

Reaffirmed and extended in Williams v. Williams, 108 Iowa 95, 96, 78 N. W. 793, holding further that when a trustee or other fiduci-

ary buys property in his own name with trust funds, a trust results in favor of the *cestui que* trust.

Reaffirmed and qualified as to first paragraph in Malley v. Malley, 121 Iowa 239, 240, 96 N. W. 751, holding, however, that one who asks to establish a resulting trust by parol evidence, and ingraft it on the legal title, must do so by evidence that is clear, certain and practically overwhelming.

And see 149 Iowa 339, 128 N. W. 374.

2. Limitation of Actions—Application in Equity—Laches.—A claim satisfactorily established will not be regarded stale by a court of equity, and for that reason its enforcement refused, when it has not run for a period that is necessary to create a bar under the statute of limitations, p. 48.

Reaffirmed and qualified in Long, Adm'r, v. Valleau, 87 Iowa 686, 55 N. W. 34, holding that when a party seeks to defeat a claim in equity when it is not barred by statute, by reason of the laches or delay of the party seeking its enforcement, the former must show that he was thereby prejudiced to such an extent as to make it inequitable to grant the relief.

3. Descent and Distribution—Husband and Wife—Homestead—Rights of Heirs and of Surviving Consort.—Upon the death of either the husband or wife who owns the legal title to homestead, the title descends—under the Code of 1860—to the heirs, subject to the right of occupancy by the surviving consort, p. 48.

Reaffirmed and explained in Reilly v. Reilly, 135 Iowa 442, 443, 110 N. W. 446, holding that the right of the wife to continue in possession and occupancy of the homestead after the death of the husband, is not a right or interest in his estate which she takes by inheritance, but is entirely distinct from the interests which she takes by virtue of that right: That it is a mere personal right to occupy and possess the premises, but is unaccompanied by any title or property interest therein.

Reaffirmed, explained and extended in Johnson v. Gaylord, 41 Iowa 366, 367, holding that upon the death of the party owning the homestead it descends to the heirs, subject to the right of occupancy by the surviving consort; and that, if thereafter, the latter abandons its occupancy as a home, she (or he) becomes a tenant in common with the heirs to the extent of the dower interest or distributive share; and in such case the heirs take it free from the debts of the ancestor or deceased owner thereof.

Reaffirmed, explained and varied in Strong v. Garrett, 90 Iowa 102-104, 57 N. W. 716, holding that upon the death of the husband or wife in whom the legal title to a homestead is vested, the title thereto descends to the heirs of the decedent, subject to the rights of the survivor: And where the survivor elects to retain the homestead

for life in lieu of his (or her) distributive share in the real estate of the intestate who, in this case left children surviving, the interest of such survivor in the homestead is thereby limited to the right to use and occupy it during his (or her) lifetime: And if in such case, a child of the decedent thereafter dies, the interest inherited by the surviving parent in the child's interest in the homestead is no part thereof, and may be sold under execution against the living parent.

Distinguished in Johnston v. McPherran, 81 Iowa 233, 47 N. W. 61, holding that a wife has no homestead right or interest in lands fraudulently conveyed by her husband before his marriage to her.

Cross reference. See further on this question, annotations under Rule 2 of Burns v. Keas (21 Iowa 257), Vol. II, p. 900.

LANGWORTHY v. MCKELVEY, 25 IOWA 48

1. Injunction—Action on Bond for Damages—When Attorney's Fees Recoverable as Damages.—In an action on an injunction bond, the plaintiff may recover as part of his damages, reasonable attorney's fees incurred by him in procuring the dissolution of the writ. If the injunction is the only object of the first action, the plaintiff who sues on the bond may recover all reasonable attorney's fees incurred in the injunction action; but if the writ is merely auxiliary to the relief sought, attorney's fees for services rendered in defending the first action on the merits, or other branches than the injunction itself, cannot be recovered as damages in the action on the bond, pp. 51, 52.

Reaffirmed and explained in Wallace v. York, 45 Iowa 83, 84, holding that where injunction is auxiliary to an action, the defendant who sues on the bond is entitled to recover all reasonable attorney's fees incurred in a good faith effort to have the injunction dissolved in the first action.

Reaffirmed and explained in Carroll County v. Iowa R. R. Land Co., 53 Iowa 686, 6 N. W. 70, holding that where an injunction is merely auxiliary to the relief sought in an action, and it is not dissolved until final hearing, no attorney's fees therein are recoverable in an action on the bond.

Reaffirmed and explained in Bullard v. Harkness, 83 Iowa 375, 376, 49 N. W. 855; Leonard v. Capital Ins. Co., 101 Iowa 483, 484, 70 N. W. 630, holding where an injunction is merely auxiliary to the first action the defendant who sues on the injunction bond cannot recover attorney's fees for services of attorneys in the first action which were not incurred or done in procuring the dissolution of the injunction.

Reaffirmed and explained in Ady v. Freeman, 90 Iowa 404, 57 N. W. 880, holding that where an injunction is not the only relief demanded, and it is not dissolved until final hearing, then in an

action on the bond no attorney's fees are recoverable by plaintiff (defendant in the injunction action), unless he proves that they were incurred in obtaining the dissolution of the writ.

Reaffirmed and extended in *Reece v. Northway*, 58 Iowa 189, 190, 12 N. W. 259; *Thomas v. McDaneld*, 77 Iowa 302, 303, 42 N. W. 302, 303, holding further that where the injunction is the only relief sought, and it is dissolved upon final hearing, attorney's fees incurred by the defendant in the entire action may be recovered as damages in an action on the bond.

Reaffirmed and narrowed in *Weierhauser v. Cole & Johnson*, 132 Iowa 18, 109 N. W. 301, holding that where the injunction sought is merely collateral or auxiliary to the principal controversy, and its maintenance is not decisive of, the very question at issue, attorney's fees are not recoverable as damages in an action on the bond.

Unreported citation, 109 N. W. 302.

Cross reference. See further on this question, annotations under *Behrens v. McKelvie* (23 Iowa 333), ante. p. 108.

2. Injunction—Duty of Defendant in Injunction Action to Obey Writ—Action on Bond—Damages—Defense.—It is the duty of the defendant in an injunction action to obey the writ until it is dissolved. And in an action on the injunction bond the defendant (plaintiff in injunction action) cannot defend by showing that the plaintiff (defendant in the injunction action) would not have suffered damage had he disobeyed the writ, and proceeded in a particular manner, p. 55.

Cited in *Young v. Rothrock*, 121 Iowa 591, 96 N. W. 1106, the court holding that a defendant who disobeys an injunction writ is guilty of contempt, and should be punished therefor.

And see 147 Iowa 672, 126 N. W. 794.

ALLISON & CRANE *v.* KING, 25 IOWA 56

1. Usury—Who Can Interpose Plea.—Only a party to a usurious contract or note can interpose the plea of usury as a defense thereto, p. 58.

Reaffirmed in *Carmichael v. Bodfish*, 32 Iowa 420.

Cross reference. See further on this question, annotations under *Perry v. Kearns* (13 Iowa 174), Vol. 2, p. 134.

FRANCIS *v.* DUBUQUE & SIOUX CITY R. R. CO., 25 IOWA 60, 95 AM.

DEC. 769

1. Common Carriers—Warehousemen—When Common Carrier of Freight Liable as Carrier and When as Warehouseman.—After goods have arrived at their destination, and have been unloaded and placed in its warehouse or storage room by the common carrier, to be later delivered to the consignee, the relation of common carrier

ceases, and it is only liable as warehouseman, or for want of proper care, for any subsequent loss or damage thereof or thereto.

And this is the rule although no notice of the arrival of the goods or freight be given by the carrier to the consignee, unless there be a usage or custom requiring it, pp. 62, 63, 66.

Reaffirmed in Mohr & Smith v. C. & N. W. R. R. Co., 40 Iowa 581; Hicks v. Wabash R. R. Co., 131 Iowa 298, 299, 8 L. R. A. (New Series) 235, 108 N. W. 535.

Reaffirmed and extended in State v. Creeden, 78 Iowa 560, 7 L. R. A. 295, 43 N. W. 674, holding further that after goods or freight arrive at their destination, and is deposited by the carrier in its warehouse, its responsibility as carrier ceases, it becomes a warehouseman only, and in this latter capacity is the agent of the consignee: Hence holding that intoxicating liquors so in the warehouse or depot of a common carrier may be condemned and destroyed as the property of the consignee kept therein in violation of law.

Reaffirmed and qualified in Independence Mills Co. v. B. C. R. & N. Ry. Co., 72 Iowa 539, 540, 2 Am. St. Rep. 258, 34 N. W. 322, holding, however, that there can be no uniform rule as to what acts are necessary to be done to fulfill a carrier's contract for the transportation of freight, as its duties must vary according to the nature of the consignment: Hence holding that it is the duty of a railroad company that transports a car load of grain to place the car upon its track at its destination in such a position that it can be safely, and with a reasonable degree of convenience unloaded by the consignee; and if it fails to so place the car, the consignee is not required to unload it while it is improperly placed, and the carrier is liable as such for its loss by fire while it is thus located.

Unreported citation, 23 N. W. 391.

STATE v. FELTER, 25 IOWA 67

(Later Appeal, 32 IOWA 49.)

1. Grand Jury—Challenge by Accused in Custody—Waiver by Attorney—Accused Need Not be Present—When—Harmless Error.—An accused person in custody may waive his right to challenge the grand jury, by and through his attorney; and where it is not shown that the grand jury was illegally drawn or summoned, or that any individual member was disqualified to act under the provisions of Sec. 4613 of the Code of 1860, the fact that the attorney for an accused person waived objections to the grand jury in his absence, if error at all, is without prejudice, and is not cause for reversal, pp. 69-71.

Reaffirmed in State v. Fowler, 52 Iowa 104, 105, 2 N. W. 984, holding that although an accused person is not granted an opportunity to examine or challenge a member of the grand jury, yet unless it is

shown in addition that the member was disqualified to act, such fact will not be reversible error.

Reaffirmed and explained in State v. Harris and Folsom, 38 Iowa 245, holding that where accused demurs to an indictment, and the demurrer is sustained, whereupon the court orders that the indictment be re-submitted to the grand jury, and that the accused be held on his bail previously given, the failure of the accused to then challenge the jury, constitutes a waiver of his privilege.

Reaffirmed and extended in State v. Brown, 128 Iowa 26-28, 102 N. W. 801, holding further that the fact that a defendant who was held to answer the charge of the grand jury, was not granted an opportunity to challenge the grand jury which returned the indictment against him, cannot be raised by motion in arrest of judgment: That such question must be raised by plea in abatement or by motion to set aside, or to quash the indictment.

Cited in State v. King, 37 Iowa 469, the court holding that evidence improperly admitted, and erroneous instructions given in a criminal prosecution when no prejudice is wrought a defendant, and other rulings of like character, do not demand the reversal of a judgment of conviction.

Cited in State v. Kaufman, 51 Iowa 579, 33 Am. Rep. 148, 2 N. W. 275, the court holding that an accused person may waive a statute or even a constitutional provision in his favor; and that he may, therefore, agree to a trial by a jury of less than twelve—But see State v. Carman, 63 Iowa 133, 50 Am. Rep. 741, 18 N. W. 692, (dissenting opinion citing the text), the majority court holding that an accused person cannot—under Sec. 4350 of the Code of 1873—waive his constitutional right to a jury trial, and consent to being tried by the court.

Cited in State v. Belvel, 89 Iowa 413, 27 L. R. A. 846, 56 N. W. 548, the court upholding the constitutionality—under Amendment to the Constitution adopted in 1884—of Chap. 42, Acts of the Twenty-first General Assembly requiring Grand Juries to be composed of five members in counties of a certain population, and seven members in counties of a certain population, and allowing an indictment to be returned which is concurred in by four of the jury of five, or five of the jury of seven—The court holding that when a grand jury is composed of five when it should be composed of seven, or *vice versa*, that an indictment returned by it is good, when the accused does not object thereto on such ground before pleading to it.

Distinguished and narrowed in State v. Osborne, 61 Iowa 330-333, 16 N. W. 202, holding that when a grand juror is challenged by an accused person who is held to answer as having formed and expressed an opinion of the guilt of accused, whereupon the court sustains the challenge, and directs the juror not to be present at or take any part in the consideration of the charge against the prisoner, but such direction is disobeyed by the juror, and the indictment returned

is set aside for that reason, that it is reversible error for the court to again submit the charge to the same grand jury over the objection of accused; but the prisoner should, in such case, be allowed to challenge the entire grand jury on the ground that they had formed and expressed an opinion of his guilt.

Cross references. See further on this question, annotations under Rules 5 & 6 of *State v. Reid* (20 Iowa 413), Vol. II, p. 833; Rules 1 & 2 of *State v. Ostrander* (18 Iowa 435), Vol. II, p. 662.

2. Criminal Law—Capital Crime—Trial of—Court May Permit Jury to Separate before Final Submission—Admonition to Jury.—Under Sec. 4802 of the Code of 1860, the court may, within his sound judicial discretion, permit the jury to separate during the trial of an indictment for a capital crime, at any time before the final submission, upon his properly admonishing them as required by Sec. 4803 of that Code; and this is the rule although the defendant may object thereto, pp. 71, 72.

Reaffirmed in *State v. Rainsbarger*, 74 Iowa 201, 37 N. W. 155, under Sec. 4434 of the Code of 1873.

Overruled in *State v. Garrity*, 98 Iowa 103, 104, 67 N. W. 92, holding that under Sec. 4434 of the Code of 1873, when either the State or the accused objects to the jury being permitted to separate during the trial of an indictment, they must be kept together in charge of a proper officer, and the court's refusing to require them to be so kept together, under such circumstances is reversible error—The court further holding that it is within the sound judicial discretion of the trial court on its own motion, to require the jury to be kept together in any trial under an indictment—This case, also expressly *overruling* the *Rainsbarger* case above, on this question.

3. Murder—Insanity as Defense—Evidence—Expert Testimony.—Upon the trial of an indictment for murder where the defense is insanity, a physician cannot testify that from the facts and circumstances proved upon the trial, those connected with the homicide, and the acts and conduct of the accused upon the trial, it is his opinion that the accused was insane at the time of the commission of the crime; as such testimony would usurp the province of the jury, pp. 73, 74.

Reaffirmed and explained in *Butler v. St. L. Life Ins. Co.*, 45 Iowa 98, 99, holding that the interrogatories to be put to an expert are not as to what his opinion is of the testimony, but what is his opinion if the facts are as stated to him by the questioner.

Cited in *State v. Geddis*, 42 Iowa 268, the court holding that a non-expert witness cannot testify that a person *was insane* at a certain time; but he must state the facts, and leave the jury to determine the question of sanity or insanity.

Distinguished in State v. Watson, 81 Iowa 391, 46 N. W. 871, holding that if a witness states to the jury particular facts in the presence of an expert witness on which the expert is to state his opinion, and the latter follows the former while the facts are fresh in the minds of the jury, it is not necessary that the facts be restated in the hypothetical question to the expert witness.

Cross reference. See further on this question, annotations under Rules 1-4 of Pelamourges v. Clark (9 Iowa 1), Vol. I, p. 537.

4. Murder—Insanity as Defense—Prior Insanity and Insanity of Parent of Accused—Medical Expert's Testimony.—Upon the trial of an indictment for murder where the defense is insanity, the accused may prove that he was insane at a time or times prior to the commission of the crime; and that his father was also insane.

In such case a physician may testify that at a time when he examined and observed the accused he was sane or insane, pp. 75, 76.

Cited in State v. Wright, 112 Iowa 442, 84 N. W. 543, the court holding that in all cases involving the question of mental capacity, it is competent to go into the minutest details of the personal history of the one who is claimed to be mentally afflicted.

And see 147 Iowa 196, 1912 B. Am. & Eng. Ann. Cas. 876, 123 N. W. 1011; 148 Iowa 482, 125 N. W. 667.

Cross reference. See, in this connection, Rule 3 hereof and cross reference there found.

5. Murder—Insanity as Defense—Right and Wrong Test—Uncontrollable Impulse—Instructions.—Upon the trial of an indictment for murder where the defense is insanity, the Right and Wrong test is not an invariable rule as to the criminal responsibility of the accused; but if the proof shows that he committed the crime from an uncontrollable or irresistible impulse arising from an insane condition of the mind, he is not legally responsible.

In such case where the proof justifies, the jury should be instructed that if the defendant's act in taking the life of deceased, if he did take it, was caused by mental disease or unsoundness, which dethroned his reason and judgment with respect to that act, which destroyed his power rationally to comprehend the nature and consequences of that act, and which, overpowering his will, irresistibly forced him to its commission, then he is not amenable to legal punishment; but if the jury believe from all the evidence and circumstances, that the defendant was in the possession of a rational intellect or sound mind, and allowed his passions to escape control then, though *passion* may for the time-being have driven Reason, from her seat and usurped it, and have urged the defendant with a force at the moment irresistible, to desperate acts, he cannot claim for such acts the protection of insanity, pp. 82-84.

Reaffirmed in State v. Stickley, 41 Iowa 238-240; State v. Geddis, 42 Iowa 271; State v. Mewherter, 46 Iowa 99, 100; State v. Bruce, 48 Iowa 534, 30 Am. Rep. 403; State v. George, 62 Iowa 690, 691, 18 N. W. 302; State v. Hockett, 70 Iowa 449, 30 N. W. 746; State v. McCullough, 114 Iowa 535, 89 Am. St. Rep. 382, 55 L. R. A. 378, 87 N. W. 504, in cases involving insanity in the commission of various crimes.

Reaffirmed and narrowed in State v. McGruder, 125 Iowa 746, 101 N. W. 648, holding that the Right and Wrong test is applicable when mental weakness or imbecility is interposed as a defense to crime.

ROBINSON v. ERICKSON, 25 IOWA 85

1. Pleadings—Amendment Which Is a Repetition of Former Pleading May be Stricken.—After an amended pleading which is a repetition of a former pleading is filed by leave of court, it may be stricken from the files upon motion, p. 86.

Reaffirmed and extended in Hoyt v. Beach, 104 Iowa 259, 65 Am. St. Rep. 461, 73 N. W. 493, holding further that where a demurrer is sustained to a pleading and thereafter an amendment thereto is filed which is a repetition of the former, the latter may be stricken upon motion: And this is the rule although the pleading adjudged insufficient on demurrer be thereafter withdrawn from the files.

Cross references. See further on this question, annotations under Rule 1 of Fulmer v. Fulmer (22 Iowa 230), ante. p. 23; Rule 1 of Brockman v. Berryhill (16 Iowa 183), Vol. II, p. 423.

COHEN v. DANIELS, 25 IOWA 88

1. Actions—Venue of Personal Actions—Residence, What Constitutes—"Residence" and "Domicile" Distinguished.—A personal action must, under Sec. 2800 of the Code of 1860, be brought in the county wherein some of the defendants reside; but if the defendants or defendant have or has no residence in this state, it may be brought in any county where any of them, or he, is found.

In determining the fact of residence the defendant's acts and his intention must concur to fix the place thereof.

So where a party abandons his residence in one county, and while passing through another in the act of removing to a third, is served with original notice in the second, the court thereof has jurisdiction of the action there brought.

"Residence" and "domicile" are not synonymous: The first is used to indicate the place of dwelling, whether permanent or temporary, the second to denote a fixed, permanent residence, to which, when absent, one has the intention of returning, pp. 89, 90.

Reaffirmed and explained in Fitzgerald v. Arel, 63 Iowa 106-108, 50 Am. Rep. 733, 16 N. W. 713, holding that in determining whether

or not a justice's court has jurisdiction of a cause of action under Sec. 3507 of the Code of 1873, the question is whether or not the defendant is *an actual resident* of the county, and not whether he has his domicile therein; that "residence" means the place of dwelling, whether permanent or temporary, whereas "domicile" means a fixed, permanent residence to which, when absent, a party has an intention to return.

Reaffirmed and explained in Mann v. Taylor, 78 Iowa 362, (cited in concurring opinion, 364), holding that a mere *intention* by defendant to leave the state, does not change his residence or make him a non-resident.

Reaffirmed and explained in Botna Valley State Bank v. Silver City Bank, 87 Iowa 482, 54 N. W. 473, holding that (on a question of the venue of an action and validity of the service of an original notice), where a residence is once established it continues until there is an actual change of habitation with intention to make a new residence; and that residence once acquired is presumed to continue until there is satisfactory evidence showing that it has been abandoned.

Reaffirmed and explained in Ludlow, Clark & Co. v. Szold, 90 Iowa 179, 180, 57 N. W. 678, holding that legal residence as distinguished from a mere temporary actual residence is the residence contemplated in Sec. 2580 of the Code of 1873, relating to the place of bringing actions aided by attachment: That the intention of the party and his acts are to be considered in determining the question, and they must concur in order to fix the fact of residence.

Reaffirmed and varied in State v. Savre, 129 Iowa 124, 125, 113 Am. St. Rep. 452, 3 L. R. A. (New Series), 455, 105 N. W. 388, holding (on the question of the qualification of a voter), that if a person leaves the place of his residence with the intention of residing in another place and of making it his place of residence, but never carries out his intention, the former is not changed: But if he intends to and actually becomes a *permanent* resident of the latter, the old is abandoned and the new is acquired—The *intent and fact* must concur in order to change residence.

Reaffirmed and qualified in Des Moines Sav. Bank v. Kennedy, 142 Iowa 278, 120 N. W. 744, holding that in order—under Sec. 3501 of the Code of 1897—to justify service of original notice in defendant's absence from the county or state, by leaving a copy with a member of his family, he must be an *actual resident* at the time: That a party may be a non-resident although he stays a considerable portion of his time with relatives in this state.

Cited with approval in State ex rel, Killpack v. Hemsworth, 112 Iowa 3, 83 N. W. 729, the court holding that a temporary absence with an intention to return of a justice of the peace from his town-

ship, does not operate to vacate his office or constitute a ground for proceedings therefor.

Cited in In re Estate of Titterington, 130 Iowa 358, 106 N. W. 762, the court holding that where a person has removed to another state with an intention of remaining there for an indefinite period and of making it a fixed residence or present domicile, it is to be regarded as his domicile, although he may entertain a floating or uncertain intention to return to this State; and especially is this true when he buys realty in and votes in such other state.

Distinguished in Schlawig v. De Peyster, 83 Iowa 325, 326, 32 Am. St. Rep. 308, 13 L. R. A. 785, 49 N. W. 843, 844, holding that actual residence, with the purpose and intent that it is legal and shall be permanent, fixes the legal residence contemplated by the statute providing for service of original notice of an action by a copy delivered to a member of the defendant's family at his usual place of residence, without regard to the place of residence of his family: Hence holding that where a party moves to another state with an intention to make it his permanent home, engages in business, votes, and sits upon juries there, but leaves his wife and family in this state intending to remove them as soon as he could do so, that a service of original notice on him in this state by leaving a copy thereof with his wife at the residence of his family herein, confers no jurisdiction of his person, and a judgment rendered thereon is *void*.

Cross references. See further in this connection, annotations under Love v. Cherry, (24 Iowa 204), ante. p. 166; State v. Minnick (15 Iowa 123), Vol. II, p. 314.

HALL & Co. v. ROBISON, 25 IOWA 91

1. New Trial—Affidavits of Jurors in Support of—When and When Not Receivable—Misconduct of Juror.—The weight given to the testimony, the calculations and judgments of the jurors, and the like, necessarily inhere in the verdict itself, and are not proper to be shown by affidavits of jurors to impeach or defeat their verdict.

But the affidavit of a juror is receivable in support of a motion for a new trial to show matters not inhering in the verdict itself; as that one of the jurors stated alleged facts concerning the case which were not in evidence, p. 93.

Reaffirmed and explained in Kruidnier Bros. v. Shields, 70 Iowa 431, 30 N. W. 682, holding that where the jury obtained and considered in their retirement (without plaintiff's knowledge) a paper not in evidence, and were influenced thereby in arriving at their verdict, that it was sufficient ground for a new trial; and that affidavits of jurors were admissible in support of the motion therefor, to prove such fact.

Reaffirmed and explained in Wilberding v. City of Dubuque, 111 Iowa 486, 487, 82 N. W. 958, holding that where a juror states what

he claims to be within his personal knowledge and consisting of material facts which were not introduced in evidence to the other jurors, after the jury has retired for the consideration of the case, such statement constitutes misconduct, and is ground for setting aside the verdict.

Reaffirmed, explained and extended in Wilkins v. Bent & Cottrell, 66 Iowa 532, 24 N. W. 30; Griffin & Adams v. Harriman, 74 Iowa 439, 440, 38 N. W. 140, 141; Baxter, Adm'r v. City of Cedar Rapids, 103 Iowa 608, 609, 72 N. W. 793; Clark v. Van Vleck, 135 Iowa 200, 112 N. W. 651, holding that affidavits of jurors may be received in support of a motion for a new trial and to avoid their verdict, to show any matter occurring during the trial or in the jury-room which does not essentially inhere in the verdict itself; as that a juror was improperly approached by a party, his attorney or agent; that witnesses or others conversed as to the facts or merits of the case in the presence of the jurors; that the verdict was determined by aggregate or average, or by lot, or by game of chance, artifice or other improper manner: But such an affidavit will not be received to show any matter which essentially inheres in the verdict itself; as that the juror did not assent to it; that he did not understand the instructions of the court, the statements of the witnesses, or the pleadings; that he was unduly influenced by his fellow jurors, or was mistaken in his calculation, judgment, or any other matters resting alone in his breast.

Reaffirmed and extended in Douglass v. Agne, 125 Iowa 71, 72, 99 N. W. 552, holding further that if the jury consider any evidence or statements of persons other than that introduced upon the trial and which it is reasonably probable influenced their verdict, it is such misconduct as will require a new trial; and that the affidavits of jurors are admissible to prove such fact.

Reaffirmed and qualified in Carbon v. City of Ottumwa, 95 Iowa 528, 64 N. W. 414, holding that the fact that a juror during the progress of a trial, takes measurements of certain land involved in an action, although misconduct, is not cause for new trial, when it does not appear on the motion therefor that such conduct prejudiced the substantial rights of the party seeking the new trial—The court saying: "It is not every act of misconduct of a juror which will warrant a court in setting aside a verdict. It should be made to appear that the misconduct prejudiced the complaining party. The circumstances disclosed should be such as to satisfy the trial court that a fair and impartial trial has not been had."

Cross references. See further on this question, annotations under Wright v. Ill. & Miss. Telegraph Co. (20 Iowa 195), Vol. II, p. 800; State v. Accola (11 Iowa 246), Vol. I, 810; Stewart v. B. & M. Riv. R. R. Co. (11 Iowa 62), Vol. I, p. 771.

See, also, in this connection, annotations under *Shields v. Guffey* (9 Iowa 322), Vol. I, p. 583.

HODGSON, ADMINISTRATOR, v. LOVELL, 25 IOWA 97, 95 AM. DEC. 775

1. Conveyance—Record of—Sufficiency of Index Entry—Constructive Notice.—It is not essential to a valid registration of a conveyance and in order to impart constructive notice, that the index entry contain a description of the land: It is sufficient if it points to the record with reasonable certainty, and so as to put an ordinarily prudent man upon inquiry as to the state of the record: And in such case a person is notified of the facts such an inquiry and examination of the record would have disclosed, p. 98.

Reaffirmed in *Peirce v. Weare*, 41 Iowa 381.

Cross references. See further on this question, annotations under *Barney v. Little* (15 Iowa 527); *Bostwick v. Powers* (12 Iowa 456); *Miller v. Bradford* (12 Iowa 14), Vol. II, pp. 381, 74, and 2; *Calvin v. Bowman and Neal* (10 Iowa 529), Vol. I, p. 741.

See, also, in this connection, annotations under *Barney v. McCarty* (15 Iowa 510), Vol. II, p. 376.

SPEARING v. CHAMBERS AND INGHAM, 25 IOWA 99

1. Pleadings in Equity—Dismissal of Bill—Effect on Cross-bill—Practice.—Under Sec. 2892 of the Code of 1860, the dismissal by plaintiff of his bill in equity, does not authorize the dismissal of a cross-bill therein filed, unless the matter set up in the cross-bill is necessarily dependent upon the establishment by plaintiff of the facts set out in his bill, pp. 100, 101.

Reaffirmed and extended in *Novak v. Novak and Remley*, 137 Iowa 524, 525, 115 N. W. 3, holding further that the entry of a decree in equity upon the main issue, does not dispose of an issue or cross-action in a cross petition; especially where the decree does not dispose of the issue or cause of action in the cross petition in so far as germane to the main issue, and where, after such decree, the co-defendant answers to the merits of the cross petition.

Cross reference. See further on this question, annotations under *Worrel v. Wade's Heirs* (17 Iowa 96), Vol. II, p. 501.

GARDNER v. GARDNER, 25 IOWA 102

1. Landlord and Tenant—Duty and Liability of Tenant to Pay Rent to Landlord—Person Later Recovering Land Cannot Recover Rent Paid.—Where a tenant rents land from one holding the legal title, and is placed in possession thereof, it is his duty to pay the rent to the landlord; and one who thereafter recovers the land in an action to quiet the title, to which action the tenant is not made a party, cannot recover rents accruing and paid in good faith by the

tenant to the landlord before the entry of the decree: And this is the rule although the tenant was given notice not to pay such rent, pp. 103, 104.

Reaffirmed and extended in Kieth v. Paulk, 55 Iowa 261, 262, 7 N. W. 589, holding further that where a tenant rents land from one in possession and claiming title, it is his duty to pay the rent to his lessor, whether the latter owns the legal title or not: and that another claimant of the land who thereafter recovers it in an action therefor, cannot recover rent paid by the tenant to his landlord before the entry of the judgment, or decree, although the tenant was notified by the successful claimant not to so pay.

Distinguished and narrowed in Stanbrough v. Cook, 83 Iowa 712, 713, 49 N. W. 1012, holding that where after a tenant enters into possession under a lease from one holding an inferior title to that of one held by another under a subsequently executed sheriff's deed to the land, it is the tenant's duty to pay the rent accruing after the execution of the sheriff's deed, to the holder thereof, failing which he will be liable to the holder of the deed and paramount title for damages for the wrongful conversion of pasturage and crops done after the execution of the sheriff's deed.

O'NEIL v. VANDERBURG, 25 IOWA 104

1. Evidence—Admissions or Declarations of Grantor of Land After Parting With Title.—The admissions or declarations of a grantor of land which are made by him after he has parted with the title, are inadmissible as against or affecting the title of his grantee or a third person, unless they are made in the presence of the latter, p. 107.

Reaffirmed in Cedar Rapids Nat'l Bank v. Laverty, 110 Iowa 576, 80 Am. St. Rep. 325, 81 N. W. 776.

Reaffirmed and explained in Neuffer v. Moehn, 96 Iowa 733 (abstract), 65 N. W. 335, holding that after the consummation of a transfer of land the grantor becomes a stranger to the title, and his acts and declarations are not binding upon the grantee, and cannot be received to impeach the character of the conveyance as being fraudulent.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

2. Husband and Wife—Wife Joining in Deed of Husband—After-Acquired Title of Wife.—The subsequent purchase of land by a wife with her separate money does not inure to a grantee of a prior deed of her husband thereto, although she had joined in the prior instrument for the purpose of relinquishing her dower, p. 107.

Reaffirmed, explained and extended in Thompson v. Merrill, 58 Iowa 424, 10 N. W. 798, holding further that under Sec. 1937 of

the Code of 1873, a wife who joins in a conveyance of her husband to his land, or in a conveyance of land owned by her husband jointly with a third person, is not bound by the covenants therein, unless her liability be expressly stated on the face of the instrument: And she is not estopped by such an instrument in which her liability is not expressly stated from setting up against the purchaser, an incumbrance [in this case a lease] on the land existent at the time the conveyance was executed.

MAUNDERSCHID v. CITY OF DUBUQUE, 25 IOWA 108

(Later Appeal, 29 Iowa 73, 4 Am. Rep. 196.)

1. Municipal Corporations—Bridges—Defective Condition of Bridge—Negligence—Damages.—It is the duty of a city or town to keep bridges within its limits in a reasonably safe condition for travel; and if it fails to so do, and injury occurs without the fault or contributory negligence of the person injured, or whose property is injured thereby, it is liable in damages therefor.

So where plaintiff's horses that he is driving to a sleigh become unmanageable, run away, throws him out of the sleigh, and one of them then in passing over a bridge in a city is injured by a defect or hole therein, the city is liable in damages therefor. And this is the rule although the fright of the horses be caused by the breaking of the harness, dropping of a bolt or screw, or other similar cause or accident, which occurs without fault of the plaintiff, pp. 110, 111, 115. 115.

Reaffirmed and varied in Byerly v. City of Anamosa, 79 Iowa 209, 44 N. W. 360, holding that a city is liable in damages for injuries to a horse and damage to a buggy caused by a defect, impediment, or bank in or on a street, when the injuries and damage happens while the horse is beyond the control of its driver, and is what is known as "running away."

Cited in Collins v. City of Council Bluffs, 32 Iowa 327, 328, 7 Am. Rep. 200, the court holding that a city is liable for injuries occurring by reason of it negligently failing to keep its streets in repair: Holding also that a city is liable in damages for injuries occasioned by its negligently allowing an accumulation of ice and snow to remain upon and obstruct its streets.

Cited in Faulk v. Iowa County, 103 Iowa 446, 72 N. W. 759, the court holding that it is the duty of a county to provide railings to the approach to a county bridge, of sufficient height and strength to resist any weight or pressure which would be applied under ordinary circumstances; and that a county is liable in damages for injuries occurring by reason of a defective or frail railing to such an approach.

Cited in Nocks v. Town of Whiting, 126 Iowa 406-408, 106 Am. St. Rep. 371, 102 N. W. 109, the court holding that a city is liable for injuries to a horse occasioned by a defect in a street, happening when the horse has escaped from the barn of its owner.

Cited in Fishburn v. B. & N. W. Ry. Co., 127 Iowa 499, 103 N. W. 487, the court holding that where two causes, both of which are in their nature proximate, combine to produce an injury, one of which causes being attributable to the negligence of the defendant, and the other not being chargeable to the negligence of either party, the plaintiff may recover.

Cited in Van Camp v. City of Keokuk, 130 Iowa 720, 107 N. W. 935, the court holding that a city is liable in damages for an injury caused to the plaintiff by reason of the defective condition of or hole in the street.

Distinguished in Moss v. City of Burlington, 60 Iowa 440, 441, 46 Am. Rep. 82, 15 N. W. 269, holding that where a horse breaks his fastening to a post in a city, runs down an impassable street, and is killed by falling over a declivity, or embankment, the city is not liable in damages therefor.

Cross reference. See further on this question, annotations and cross references under McCullom v. Black Hawk County (21 Iowa 409), Vol. II, p. 920.

CEDAR RAPIDS & ST. PAUL R. R. CO. v. STEWART, 25 IOWA 115

1. Written Instruments and Contracts—Subscription for Construction of Railroad—United States Revenue Stamp to be Affixed to—Affixing by Agent.—Under the Act of Congress of June 30, 1864, a United States revenue stamp must be affixed to an agreement to subscribe money to encourage and aid in the construction of a railroad, in order to give the instrument validity. But where such agreement authorizes certain persons as agents of the subscribers to contract with the company and deliver the instrument, such agents are empowered to affix the stamp, p. 120.

Cited in Union Agricultural & Stock Ass'n v. Neill, 31 Iowa 101, the court holding that when a written instrument is put in evidence not bearing the proper stamp, it will be presumed that it was stamped at the proper time and by the proper authority.

Special cross reference. For further cases citing the text, and others in this connection, see annotations under Hugus v. Strickler (19 Iowa 413), Vol. II, p. 743.

CORBIN v. DE WOLF, 25 IOWA 124

1. Tax Sale of Land—Sale of Several Parcels in Gross—When Allowed and When Not.—Where land is properly and legally assessed for taxation *in a body* instead of in parcels, it may be sold for

taxes in gross; but if separate parcels of land are assessed separately, or are in fact distinct and separate, a sale thereof in gross is void, pp. 127, 128.

Reaffirmed in Ware v. Thompson, 29 Iowa 66, 67; Bulkley v. Callanan, 32 Iowa 463, 464.

Reaffirmed and explained in Corning Town Co. v. Davis, 44 Iowa 630, 631, holding that several parcels of land lying in a body may be assessed and sold as one tract, as the property of an unknown owner: Holding, therefore, that where a forty acre tract of land which is divided into town lots is assessed as a whole as the property of an unknown owner, and so sold, the fact that it is owned by more than one person does not render the sale invalid.

Reaffirmed and extended in Eldredge v. Kuehl, 27 Iowa 170; Bulkley v. Callanan, 32 Iowa 463, 464, holding further that where a tax deed to land shows on its face that eighty acres were sold in gross, it will be presumed, until the contrary is shown, that it was legally assessed in a body, and therefore legally so sold.

Reaffirmed and qualified in Stewart v. Corbin, 25 Iowa 145-148, holding, however, that homestead can only be sold—under Chap. 173, Acts of 1862—for taxes due thereon; and if it be sold for other taxes, or together with other land for taxes, the sale is void.

(Note.—See, in connection with this last case, Salter v. City of Burlington, 42 Iowa 533, 534, distinguishing it, but not citing the text.—Ed.)

Reaffirmed and qualified in Martin v. Cole, 38 Iowa 145-147, 152, (cited in concurring opinion, 156), holding that a tax deed showing a sale for taxes of two or more tracts or parcels of land together is void, and will defeat the title based thereon: But that a section of land belonging to an unknown owner may be sold for taxes as one parcel or tract, and a tax deed therefor is valid.

Cited in Johnson v. Chase, 30 Iowa 310, the court holding that the fact that a quarter-section of land is assessed and sold for taxes in three parcels, instead of as a whole, does not invalidate the sale: Holding further that the fact that a tax warrant under which such land is sold has no seal, or is issued without an order from the board of supervisors, does not affect the validity of the tax title.

Cited Rima v. Cowan, 31 Iowa 127, the court holding that under the Code of 1860, a tax deed to land is *conclusive* as to the *manner* of the sale; and that when two such deeds recite that separate parcels of land, separately assessed, were sold separately, such recitals cannot be impeached by showing that the parcels were *in fact* sold in gross.

Cited in C. R. & M. R. Co. and Iowa R. R. Land Co. v. Carroll County, 41 Iowa 176, the court holding that one section of land in a contiguous body is one "tract" or "subdivision" or "parcel," as much as forty acres: And that when taxes are due and delinquent

upon a whole section of land, or a half, or a quarter thereof, in one contiguous body belonging to the same owner, the treasurer is not authorized to advertise such lands in the smallest subdivisions, thus creating unnecessary and oppressive costs, but should advertise the whole tract in a single description.

Cited in Ware v. Little, 35 Iowa 236, the case turning upon another question.

Cross references. See further on this question, annotations under Boardman v. Bourne (20 Iowa 134); Penn v. Clemans (19 Iowa 372), Vol. II, pp. 791 and 739, respectively. See also, in this connection, annotations under Allen v. Armstrong (16 Iowa 508), Vol. II, p. 465.

STATE v. MOORE, 25 IOWA 128, 95 AM. DEC. 776

I. Murder—Murder in Second Degree—Death in Procuring Abortion—Intention to Cause Death Immaterial—Implied Malice—Instructions.—Where accused caused the death of a woman in a willful and unlawful attempt to procure an abortion, there being no necessity for it, it is—under Sec. 4221 of the Code of 1860—murder in the second degree, although the accused had no intention to take the life of deceased. In such case malice will be implied from the willful and unlawful act of accused.

Upon the trial of an indictment for murder where the evidence shows that the accused is guilty of murder in the second degree in willfully and unlawfully attempting to procure an abortion, or is not guilty at all, the court should confine his instructions to that degree of the crime, and not give a manslaughter instruction, pp. 133, 137.

Reaffirmed as to second paragraph in State v. Cater, 100 Iowa 505, 69 N. W. 881, holding that when the evidence shows the defendant guilty of the offense charged or none, the court is not bound to instruct as to the lower degrees.

Reaffirmed, explained and extended in State v. Baldes, 133 Iowa 163, 164, 109 N. W. 903, holding further that an unlawful killing with malice, express or implied, is murder in the second degree, even though unaccompanied by deliberation, premeditation, or specific intent to kill: And holding further that if the killing be shown not only to have been done in malice, but with deliberation, premeditation, and a specific intent to kill, then, under our statute (Code of 1897), it is murder in the first degree.

Reaffirmed, explained and extended in State v. Thomas, 135 Iowa 724, 109 N. W. 903, holding further that the administration of poison unlawfully and with bad intent constitutes malice aforethought without specific intent to kill, just as a felonious act in inflicting a grievous bodily injury supplies the malice aforethought necessary to constitute murder, although there is no specific intent to kill proven in connection with the infliction of such injury: And holding, also,—as does the

present case in argument—that malice may be implied from unlawful acts dangerous to life, committed without lawful justification.

Reaffirmed and extended in State v. Gibbons, 142 Iowa 98, 99, 120, N. W. 475, holding further that an indictment for murder in the second degree which charges that the accused did “wilfully and feloniously” administer drugs and use an instrument to produce a miscarriage when it was not “necessary to save the life of the pregnant woman” thereby causing her death, is sufficient without averring that the acts were done “with malice aforethought.”

Cited in State v. Hayden, 131 Iowa 8, 107 N. W. 931, the court holding that where a person assaults another with a deadly weapon without legal excuse, malice will be thereby presumed, in the absence of direct or implied proof to the contrary.

2. Evidence—Witnesses—Impeachment of General Character—Impeachment of Character Witnesses.—Whether, after the accused has introduced witnesses to impeach the general character of certain witnesses for the State, the State may introduce witnesses similarly impeaching the character witnesses, is not decided; but the court is of the opinion that such evidence is admissible, pp. 137, 138.

Cited with approval in State v. Walker, 133 Iowa 496, 110 N. W. 928, the court not deciding the point because not properly raised, but being of the opinion of the text.

3. Trial—Practice—Objection to Introduction of Evidence—When to be Made.—Objection to the introduction of evidence, where suggested by the question to the witness, must be made before the witness answers and it is admitted, or it will be too late, p. 138.

Reaffirmed in State v. McKinstry, 100 Iowa 86, 87, 69 N. W. 268.

Reaffirmed and qualified in Smith v. Dawley, 92 Iowa 314, 315, 60 N. W. 626, holding that where a witness’ answer to a proper question mingles improper or irrelevant and incompetent testimony with that which is proper, relevant and competent, the remedy of the party prejudiced is to move to strike or exclude the former; and he must give the grounds of his objection, or his motion will be overruled.

Cited in State v. Van Tassel, 103 Iowa 13, 72 N. W. 499, the case turning upon other points.

(Note.—See further, Blackmore v. Fairbanks, Morse & Co., 79 Iowa 282, 44 N. W. 548; State v. Bengé, 61 Iowa 658, 17 N. W. 100; State v. Day, 60 Iowa 100, 14 N. W. 132, some important cases sustaining and qualifying, but not citing the text.—Ed.)

SPENCE v. CHICAGO & NORTHWESTERN RY. CO., 25 IOWA 139

1. Railroads—Liability for Killing Stock—Swine Running at Large Contrary to County Regulation.—A railroad company is

liable absolutely, under Chap. 169, Acts of 1862, for killing a hog on its track at any place where it has a right to but does not fence, although the hog, at the time it is killed, is running at large contrary to a county regulation; and the owner's merely permitting it to so run at large does not, of itself, constitute such negligence, or willful act occasioning the killing as will preclude his recovery, pp. 141, 142.

Reaffirmed and extended in Stewart v. Ch. & N. W. R. R. Co., 27 Iowa 284, 285, holding further that under Chap. 79, Acts of 1868, the rule is applicable equally to the lessee of a railroad.

Reaffirmed and extended in Stewart v. B. & M. R. R. Co., 32 Iowa 562, 563, holding further that the fact that a bull is running at large by *permission* of the owner does not preclude his recovering for the killing thereof by a railroad company's train at a place where the company had a right to but did not fence its track: And holding further that in such an action the burden is on the railroad company in order to escape liability, to prove that the killing was occasioned by the *willful act* of the owner; that is by the owner's act which was done stubbornly, by design and with a set purpose.

Reaffirmed and extended in Fritz v. M. & St. P. R. R. Co., 34 Iowa 338; Lee v. Minn. & St. L. Ry. Co., 66 Iowa 132, 133, 23 N. W. 299, holding further that under Sec. 6, Chap. 169, Acts of 1862, and Sec. 1289 of the Code of 1873, when a railroad has a right to fence its track, it must do so in such a manner as to turn hogs, failing which it is liable absolutely for killing or injuring them at any such place by its train: And this is the rule although the hogs be running at large contrary to a regulation of the county, or contrary to statute.

Reaffirmed and extended in Clary v. Iowa Midland R. R. Co., 37 Iowa 347, 348, holding further that under the law of the text, and Chap. 79, Sec. 1, Acts of 1868, a railroad company running and operating its cars under a lease, is absolutely liable to the same extent for stock killed or injured by its trains at points on the road where it was lawful to fence and where no fences have been erected, as if it owned the road, and it cannot relieve itself of this liability by a private contract with the lessor of the road.

Reaffirmed and extended in Krebs v. Minn. & St. L. Ry. Co., 64 Iowa 671, 672, 21 N. W. 132, holding further that the fact that the owner of a horse *permits* it to run at large in the night-time, and contrary to the night herd law in force in the county, does not preclude his recovering against a railroad company—under Sec. 1289 of the Code of 1873, the law of the text—for killing it at a place where the company had a right to but did not fence: Holding, also, that the phrase “willful act of the owner” in such section and precluding his recovery, implies something more than his mere negligence, and means an act in some way connected with the injury, such as driving the livestock upon the track, or permitting it to escape for the purpose of going upon the track, or the like—And to the same effect is

Claus v. Ch., G. W. Ry. Co., 136 Iowa 11, 12, 111 N. W. 16, reaffirming the text.

Reaffirmed and extended in Anderson v. C. R. I. & P. Ry. Co., 93 Iowa 563, 564, 61 N. W. 1059, holding further that under Sec. 1289 of the Code of 1873 (the law of the text), a railroad company is liable for killing a horse which gets upon its track by reason of its failure to repair a fence of its right of way in such a manner as to turn stock, unless the killing of the horse was occasioned by the willful act of the owner or his agent: And that the mere fact that the owner or his agent permitted the horse to be turned out in a field adjoining the right of way, does not prevent recovery.

Cited in Small v. C. R. I. & P. R. R. Co., 50 Iowa 352, 357, (dissenting opinion), the majority court holding that under Sec. 1289 of the Code of 1873, part of the law of the text, a railroad company is not liable absolutely and in the absence of negligence for damages occasioned by fires caused by its operating its trains; but that the fact that a fire occurs from such cause is only *prima facie* evidence of the company's negligence.

Cited in Stuber v. Gannon, 98 Iowa 231, 67 N. W. 106, not in point.

Distinguished in Ford, Adm'x, v. Ch. R. I. P. Ry. Co., 91 Iowa 183-185, 24 L. R. A. 657, 59 N. W. 7, holding that in an action to recover damages for the death of a person caused by a railroad train, where the administrator claims the right to recover by reason of the neglect or refusal of the railroad company to provide sufficient and safe crossings and cattle guards at a public highway crossing as provided by Sec. 1288 of the Code of 1873, the plaintiff, in order to recover, need only establish the neglect or refusal of the company to comply with the statute and that the death resulted therefrom; but that such section does not preclude the defendant from showing contributory, or even independent negligence on the part of the intestate, or any other defense it may have.

Cross references. See further on this question, annotations under Fernow v. Dubuque & S. W. R. R. Co. (22 Iowa 528), ante. p. 66; Russell v. Hanley (20 Iowa 219), Vol. II, p. 804.

STEWART v. CORBIN, 25 IOWA 144

(Later Appeal, 38 Iowa 571.)

1. Tax Sale of Land—Sale of Several Parcels in Gross—When Allowed and When Not.—Where land is properly and legally assessed for taxation in a *body* instead of in parcels, it may be sold for taxes in gross; but if separate parcels of land are assessed separately, or are in fact separate and distinct, a sale thereof in gross is void, pp. 145, 146.

Special cross reference. For cases citing, sustaining, explaining and qualifying the text, and others on the question, see annotations under *Corbin v. De Wolf* (25 Iowa 124), ante. p. 244.

2. Tax Sale of Land—Homestead, Sale of With Other Land—Effect.—Where homestead is sold for taxes other than those due thereon, or together with other land for taxes, the sale is—under Sec. 766 of the Code of 1860—void *ab initio* and *in toto*; and where such homestead is assessed or listed for taxation before any such sale is made after the taking effect of Chap. 173, Acts of 1862 requiring homestead to be listed separately before it is exempt from liability for other taxes, the sale is nevertheless void, pp. 147, 148.

Distinguished and narrowed in *Salter v. City of Burlington*, 42 Iowa 533, 534, holding that in order to exempt homestead from liability to a sale for taxes on other property, it must—under Chap. 173, Acts of 1862—be listed separately *as homestead*.

3. Tax Sale of Land—Treasurer to Endeavor to Collect Taxes by Distress of Personal Property Before—Conclusiveness of Tax Deed as to.—It is the duty of the county treasurer to endeavor to collect delinquent taxes by distress and sale of personal property before selling land therefor; but the fact that he fails to do his duty in this respect will not invalidate a sale of land therefor: And a tax deed to land is, under Sec. 784 of the Code of 1860, conclusive of the fact that the treasurer complied with his duty in this regard, p. 146.

Special cross reference. For cases citing the text and many others in this connection, see annotations under *Allen v. Armstrong* (16 Iowa 508), Vol. II, p. 465.

PATTERSON, ADMINISTRATOR, *v.* BELL, ADMINISTRATOR, 25 IOWA 149

1. Executors and Administrators—Settlements with County Judge—Time in Which to be Set Aside—Fraud, Mistake, Etc.—In the absence of mistake, fraud or other grounds of equitable relief, a settlement of an administrator with the county judge, even if made in the absence of those interested, cannot—under Secs. 2447, 2456, 2457 of the Code of 1860—be set aside after the expiration of three months from the approval thereof, p. 151.

Reaffirmed in *Ashton v. Miles*, 49 Iowa 568.

Reaffirmed, explained and qualified in *Kows v. Mowery*, 57 Iowa 21, 22, 10 N. W. 284, holding that the final settlement with and discharge of an administrator by the circuit or probate court is a final adjudication upon the parties in interest, unless it be impeached for fraud or mistake: And that under Sec. 2474 of the Code of 1873, mistakes in the settlements of an administrator may be corrected after final settlement upon showing such grounds for relief in equity as will justify the interference of the court: But that, under Sec. 2475 of the Code of 1873, a final settlement with an administrator made in

the absence of a person adversely interested and without notice to him, cannot be opened after the expiration of three months from the approval thereof, in the absence of averment and proof of fraud, or mistake.

Reaffirmed and extended in Bradbury v. Wells, 138 Iowa 676, 677, 16 L. R. A. (New Series), 240, 115 N. W. 882, holding further that—under Sec. 3399 of the Code of 1897—any party may move to set aside an order finally discharging an executor, and to surcharge the final settlement within three months after the entry thereof, and approval of the settlement, without a charge or proof of fraud or mistake; but that when such an order is sought to be set aside and the settlement surcharged by an action in equity after such time and on the ground of fraud or mistake, it must consist of something collateral or extrinsic to the matter tried upon the original hearing, and not that on which the judgment was entered or order was made.

Reaffirmed and qualified in Doris, Ex'r, v. Miller, 105 Iowa 572-574, 75 N. W. 484, holding that mistakes in settlements may be corrected at any time before final settlement; and that the provisions of Sec. 2475 [Code of 1873] limiting the time within which application may be made to open up accounts settled in the absence of parties in interest, have no application to mistake or to fraud in the settlement of an administrator's intermediate account.

Cited in Cowins v. Tool, Ex'r, 36 Iowa 85, the court holding that mistakes in settlements with an executor by the probate court may be corrected—under the Code of 1860—at any time before final settlement and discharge; but that this must be done in the circuit court by proper proceedings pertaining to the estate itself, and not by an action in equity: The court holding further that settlements of an executor which are approved by the probate court will be conclusive until impeached for fraud or mistake.

Cited in In re Estate of Berryhill, 61 Iowa 349, 16 N. W. 200, the case involving other points.

(Note.—See further on this question, Graves v. Graves, 132 Iowa 199, 10 L. R. A. (New Series), 216, 109 N. W. 707; Tucker v. Stewart, 121 Iowa 716, 97 N. W. 148; Bennett v. Hibbert, 88 Iowa 154, 55 N. W. 93; Allen v. Seward, 86 Iowa 718, 52 N. W. 557; Desaint v. Foster, 72 Iowa 639, 34 N. W. 454; Meeker v. Meeker, 74 Iowa 352, 34 N. W. 1; Arnold v. Spates, 65 Iowa 570, 22 N. W. 680; Latham v. Myers, 57 Iowa 519, 10 N. W. 924, some important cases on this question, and in connection herewith, not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of Clark v. Cress (20 Iowa 50), Vol. II, p. 773.

2. **Executors and Administrators—Compensation for Extraordinary Services—Presumption Upon Appeal as to Correctness of**

Court's Order.—The county judge may, under Sec. 2454 of the Code of 1860, allow an administrator additional compensation for extraordinary services, in excess of the usual percentage for ordinary services thereby provided: And where a sum in excess of that so provided is allowed by the county court to an administrator, it will be presumed upon appeal, unless the contrary be shown by the record, that it was rightly allowed by the county court for such extraordinary services, p. 151.

Reaffirmed in Anderson v. Sabin, and Woodruff, Executors, 132 Iowa 509, 109 N. W. 1081, under the Code of 1897.

McCONN v. ROBERTS, TREASURER, 25 IOWA 152

1. Taxation and Revenue—Who Deemed a "Merchant" for Purposes of Taxation—Pork Buyer and Packer—Property of, How Listed.—One engaged in the business of buying and packing pork and selling it outside of the State, is deemed a "merchant" under the provisions of Sec. 723 of the Code of 1860, and as such is entitled to list his property or merchandise according to the average value thereof during the year next previous to the time of assessing.

The fact that the property was held for the purpose of being sold outside of the State or that it was in fact so sold, does not affect the liability of the owner for taxation; nor does the fact that the property was purchased on credit, or with borrowed capital relieve the owner therefrom: He must pay taxes upon his property; but in making up his moneys and credits for listing for taxation, he will—under Sec. 721 of the Code of 1860—be entitled to deduct therefrom all *bona fide* debts owing by him, pp. 154, 155.

Distinguished in In re Iowa Pipe & Tile Co., 101 Iowa 172, 173, 70 N. W. 115, holding that a company engaged in the manufacture and sale of sewer pipe and drain tile, is a "manufacturer" and not a "merchant" and its property is assessable under Sec. 816 of the Code of 1873; but that the cost of the coal used for the burning of the material and the labor employed to produce it, is not to be taken into account in ascertaining the value thereof for taxation.

Distinguished and narrowed in Jewell v. Board of Trustees of Sumner Township, 113 Iowa 49-52, 84 N. W. 975, holding that one who buys sheep for the purpose of feeding and fattening them for the market is not a "merchant" within the meaning of Sec. 1318 of the Code of 1897; but that one who buys such livestock for the purpose of immediate sale may be regarded a "merchant" within the provisions of such section.

OSKALOOSA COLLEGE v. HULL, 25 IOWA 155

1. Schools and Colleges—Note Given to Endow in Consideration of Scholarship—Action on—Defenses.—In an action on a note

given to "endow and furnish" a college in consideration of the maker having the disposal of a scholarship, the maker cannot defeat recovery by showing that the school is being taught by ignorant and incompetent teachers, or that the buildings of the college have been rented to other persons, and is being taught by such teachers, p. 157.

Cited in Ingham v. Rudley, Adm'r, 60 Iowa 23, 14 N. W. 86, the court holding that a note which is part of an endowment of a college or educational institution, is a trust fund, and cannot be subjected to the general debts of the institution; nor can it be diverted from the trust purposes either by the trustees thereof or by judicial proceedings.

MERRIAM v. MOODY'S EXECUTORS, 25 IOWA 163

1. Municipal Corporations—Powers Express and Implied—Construction of Powers Conferred.—A municipal corporation has only the powers expressly granted, those necessarily implied or incident to powers expressly granted, and those absolutely essential and indispensable to the declared objects and purposes of the corporation; and any fair doubt as to the existence of such a corporate power is to be resolved against it, and against the corporation, p. 170.

Reaffirmed in Logan & Sons v. Pyne, 43 Iowa 525, 22 Am. Rep. 261; Heins v. Lincoln, 102 Iowa 77, 71 N. W. 191.

Reaffirmed and extended in Belmeyer, v. Indep. Dist. of Marshalltown, 44 Iowa 565; McShane v. Indep. Dist. of Pleasant Grove, 76 Iowa 335, 41 N. W. 34; Ries v. Hemmer, 127 Iowa 411, 103 N. W. 347, holding further that the rule is equally applicable to an independent school district, and the powers of its officers.

Cross references. See further on this question, annotations under Clark v. City of Des Moines (19 Iowa 199); Clark, Dodge & Co., v. City of Davenport (14 Iowa 494), Vol. II, pp. 715 and 272, respectively.

2. Municipal Corporations—Authority to Levy Special Tax—Collection by Sale Not Expressly Conferred—Effect—Procedure—Collection by Action—Void Tax Sale.—A power granted to a city to "levy and collect a special tax on lots, for curbing, macadamizing, etc.," to be "enforced and collected as may be provided by ordinance," does not authorize the city to pass an ordinance providing for a sale and conveyance of such lots without an action to enforce the taxes; and such sale or sales and deeds made thereunder are void, pp. 171-175.

Reaffirmed and explained in City of Dubuque v. Harrison, 34 Iowa 165, 166, holding—as does the present case in argument—that where a city is granted the power to "levy and collect taxes," but the charter or act granting the power is silent as to the mode of

collection, the city may provide that it be done by judicial proceedings.

Cited in Warren v. Henly, 31 Iowa 44, upholding as constitutional an act allowing a city to levy a special tax for paving and repairing pavements and authorizing a sale of abutting lots therefor.

Cited in Parker v. Sexton & Son, 29 Iowa 426, the case turning on other questions.

Cross references. See further on this question, annotations under McInerny v. Read (23 Iowa 410), ante. p. 116; Ham v. Miller (20 Iowa 450), Vol. II, p. 843.

BOOTH & GRAHAM v. SMALL AND SMALL, 25 IOWA 177

1. Adverse Possession—What Constitutes—Uncultivated, Uninclosed, or Wild Land—Possession of Land Defined.—In order to constitute adverse possession of land it must be under color or claim of title, and actual, continued, visible, notorious, distinct and hostile during the statutory period required to bar an action for the recovery of real estate: But such an adverse possession of uninclosed, uncultivated, or wild land may be by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable, and as are necessary to acquire the profits it yields in its condition—such acts being continued and uninterrupted for the statutory period of limitation, and being done under color of title or claim of right.

“Possession” of land is the holding of and exclusive exercise of dominion over it, pp. 180, 181.

Reaffirmed in Whalley v. Small and Small, 25 Iowa 190; 29 Iowa 289; Teabout v. Daniels 38 Iowa 160-162; Colvin v. McCune, 39 Iowa 506, 507; Spitler v. Scofield, 43 Iowa 572; Brown v. Rose, 48 Iowa 233; Nolan v. Grant, 51 Iowa 521, 1 N. W. 711; Forey v. Bigelow, 56 Iowa 382, 383, 9 N. W. 313; Dice v. Brown, 98 Iowa 304, 305, 67 N. W. 255.

Reaffirmed in part and explained in Hempsted, v. Huffman, 84 Iowa 401, 51 N. W. 17, holding—in a case involving the establishment of a public road by adverse possession—that the statute of limitation commences to run as against the owner of real estate from the time another person enters thereon and takes possession thereof under color of title; and actual, continuous, visible, notorious, distinct and hostile adverse possession by the latter for the period of ten years thereafter bars an action by the owner for its recovery.

Reaffirmed and explained in Clement v. Perry, 34 Iowa 567, holding that where a person claiming land exercises acts of ownership over it by the use of it for the purpose to which it is adapted, he is in such actual occupancy of it as will bar an action after the lapse of the statutory time.

Reaffirmed and qualified in Merrill v. Tobin, 82 Iowa 534, 48 N. W. 1045, holding that where a non-resident in good faith and under an honest claim of ownership of land in this state, pays taxes thereon, he is entitled to be reimbursed therefor by one who defeats his title by reason of adverse possession.

Cited with approval in Pope v. Cheney, 68 Iowa 565, 27 N. W. 755, a case involving what constitutes legal possession of personal property.

Cited with approval in Gray v. Haas, 98 Iowa 504, 67 N. W. 395, the court holding that in order, under Sec. 2031 of the Code of 1873, to establish a highway by prescription, it is not enough to show mere use of land as a highway, even though the owner had actual knowledge of such use; but he must have express notice that a claim was made, based thereon, independent of or additional to the mere use: That the adverse "possession" must be actual, continued, visible, notorious, distinct and hostile and commenced under a claim or color of title.

Cross references. See further on this question, annotations under Rule 3 of City of Pella v. Scholte (24 Iowa 283), ante, p. 181; Campbell v. Long (20 Iowa 382), Johnson v. Hopkins (19 Iowa 49); Robinson v. Lake (14 Iowa 421); Jones v. Hockman (12 Iowa 101), Vol. II, pp. 831, 690, 259, 19, respectively.

2. Appeal—Verdict Against Evidence as Ground for Reversal—Conflicting Evidence.—Where the trial court refuses to grant a new trial, and it appears upon appeal that the evidence upon the trial was conflicting, the judgment will not be reversed because the verdict was against the evidence, unless it was clearly against the weight thereof, pp. 182, 183.

Reaffirmed and explained in Conner & Co. v. Mountain, 28 Iowa 593 (abstract), holding that when the evidence upon the trial below was conflicting, and the court who tried the case and heard the testimony as it was detailed by the witnesses, refuses to interfere with the verdict on the ground that it is against the weight of the evidence, there must be a very strong and clear case made in order to justify the interference of the Supreme Court.

Reaffirmed and extended in Hubbell & Bro. v. Ream, 31 Iowa 296, holding further that when the evidence below was conflicting, and the trial court refused to grant a new trial, the Supreme Court will not reverse because the verdict was against the evidence, unless the record presents a clear case of the trial court having abused his judicial discretion given to him in such a case.

Cross references. See further on this question, annotations under Rule 2 of Brockman v. Berryhill (16 Iowa 183), Vol. II, p. 423; Rule 2 of Shepherd v. Brenton (15 Iowa 84), Vol. II, p. 208, and cross references there found.

KEY *v.* McCLEARY, 25 IOWA 191

1. Mortgages—Deed Absolute on Face in Fact a Mortgage—Parol Evidence.—Although a deed to land is absolute on its face, it may be shown by parol evidence to have been executed as a security for a debt, and therefore is, in equity, a mortgage, p. 193.

Reaffirmed in Robertson *v.* Moline, Milburn & Stoddard Co., 88 Iowa 466, 55 N. W. 496.

Reaffirmed, explained and extended in Green *v.* Turner, 38 Iowa 115, holding that parol evidence is admissible to prove that a deed absolute on its face was intended as a security for debt: That where a transaction in relation to land is presented by writings as a conditional sale or contract for re-purchase, still the true intention of the parties may be shown by parol, and from all the facts and circumstances surrounding the transaction.

Reaffirmed, explained and extended in Crawford *v.* Taylor, Richards & Burden, 42 Iowa 263, holding further that any deed or contract to or in relation to land which is made to secure a loan of money is, in equity, a mortgage; and the redemption right attaches to it in favor of the debtor.

Reaffirmed and qualified in Langer *v.* Meservey, 80 Iowa 159, 160, 45 N. W. 732, holding that when it is sought to show by parol that a deed which is absolute on its face is in fact a mortgage, as that it was given to secure a loan, the proof thereof must be clear and satisfactory.

Cross reference. See further on this question, annotations under Trucks *v.* Lindsey (18 Iowa 504), Vol. II, p. 674.

JONES *v.* MULLINIX, 25 IOWA 198

1. Tender—What Discharges Interest Accruing After—Keeping Tender Good.—Where in an action on a promissory note the maker shows that he tendered the amount thereof and its interest to the payee, this will not discharge the former from interest thereafter accruing, unless he further shows that he was at all times ready to pay it, pp. 199, 200.

Reaffirmed and qualified in Williams Shoe Co. *v.* Gotzian & Co., 130 Iowa 715, 716, 107 N. W. 810, holding that where a creditor agrees to accept 50% of a debt due, from his debtor and in full thereof, and as proposed by the latter, but the latter does not tender or pay such amount, the creditor, in an action on the debt is entitled to recover at least 50% of the debt, with interest from the time the debtor's offer to pay it was accepted, with the costs of the action.

Special cross reference. For further cases citing and explaining the text. see annotations under Mohn *v.* Stoner (11 Iowa 30), Vol. I, p. 765.

STATE *v.* SNYDER, 25 IOWA 208

1. Criminal Law—Obstructing Highway, and County Road—Indictment for—Proof of Establishment of.—Upon the trial of an indictment for obstructing a "county road" the fact of the establishment of the road cannot be shown by parol evidence of use or prescription.

But upon the trial of an indictment for obstructing a "highway," the existence thereof may be shown by parol evidence of use or prescription, pp. 208, 209.

Reaffirmed as to last paragraph in State *v.* Robinson, 28 Iowa 514.

Reaffirmed and extended as to last paragraph in State *v.* Teeters, 97 Iowa 459, 460, 66 N. W. 755, holding further that where an indictment for obstructing a "highway" does not aver how it was established, it may be shown to have been established either by dedication or by prescription; and that upon proper proof both the questions may be submitted to the jury.

Cited in Burke *v.* Mally, 141 Iowa 559, 120 N. W. 306, the court holding that a "short-cut" across a commons between two streets in a town, used permissively by persons who cared to so do, is not a "public road."

FIRST NATIONAL BANK OF NEWTON *v.* SMITH, 25 IOWA 210

1. Principal and Surety—Discharge of Surety by Giving Notice to Sue—When.—When a surety gives the creditor written notice to sue the principal on the contract, or note, or to permit him to so do as provided by Sec. 1819 of the Code of 1860, the surety is discharged under Sec. 1820 of that Code, unless the creditor, within ten days after the giving of the notice, either brings the action against the principal or notifies the surety of his permission for him to so do, pp. 212, 213.

Reaffirmed and extended in Piper *v.* Newcomer & Campbell, 25 Iowa 222, holding further that one of several joint makers of a promissory note who appears as principal thereon, but who is in fact a surety, may comply with the statute mentioned in the text, and, upon the failure or refusal of the holder to comply therewith, be discharged.

Reaffirmed and extended in German-American Bank *v.* Denmire, 58 Iowa 138, 12 N. W. 237; Shenandoah Nat'l Bank *v.* Ayres, 87 Iowa 529, 54 N. W. 368, holding that—under Secs. 2108, 2109 of the Code of 1873, corresponding to the sections of the text—after a creditor has been given notice to sue by the surety, it is not sufficient for him to direct the institution of the action within the ten days after the notice is given; but that in order to prevent the surety being discharged, the creditor must see that the action against the principal is actually commenced within such time.

Reaffirmed and qualified in Davis Sewing Machine Co. v. McGinnis, 45 Iowa 545, 546, holding that the notice given by the surety to the creditor as provided by Sec. 1819 of the Code of 1860, cannot contain any other binding condition or qualification than those therein provided.

(Note.—See further, Thornburgh v. Madren, 33 Iowa 383; Hill v. Sherman, 15 Iowa 365, important cases sustaining and explaining, but not citing the text.—Ed.)

SIGAFOOS v. TALBOT, 25 IOWA 214

1. County Road—Establishment of—Assessment of Damages by Board of Supervisors—Appeal—Trial.—A land owner may—under the Code of 1860—appeal to the district court from an assessment of damages by the board of supervisors occasioned by the establishment of a public road; and upon such appeal the question of the amount of the damages may be tried *de novo* and by a jury, p. 215.

Reaffirmed and extended in Myers v. Ch. & N. W. Ry. Co., 118 Iowa 324, 91 N. W. 1081, holding that the rule is applicable in proceedings to condemn land for the right of way of a railroad.

Distinguished and narrowed in In re Bradley and Hansen et al, 108 Iowa 477-479, 79 N. W. 281, holding that unless specially provided by statute parties are not entitled to a trial by jury *as a matter of Right* in condemnation cases, and other *special proceedings*: Hence holding that upon an appeal to the district court from the action of the board of supervisors in a proceeding to secure the draining of wet lands, under Sec. 2, Chap. 186, Acts of Twentieth General Assembly, the parties are not entitled to a trial by jury, in the absence of an agreement therefor.

Cross references. See further on this question, annotations under City of Des Moines v. Layman (21 Iowa 153); Rule 1 of Prosser v. Wapello County (18 Iowa 327), Vol. II, p. 885, and Vol. II, p. 639.

LEE & Co. v. BRADWAY, 25 IOWA 216

1. Trial—Verdict—When Jury May Retire and Correct—Sealed Verdict.—Where there is no issue as to the *amount* of the claim of the party (plaintiff or defendant) for whom a verdict is returned, but only an issue as to his right to recover at all, and the verdict as returned does not state the *amount*, the jury may retire and correct it. And this may be done upon the opening and reading of a sealed verdict, p. 218.

Reaffirmed in Higley & Co. v. Newell, 28 Iowa 518, 519.

Reaffirmed, explained and extended in Bartle v. Plane, 68 Iowa 229, 26 N. W. 88, holding further that where plaintiff sues for a definite sum in a justice's court and the jury return a verdict "for

plaintiff" (not fixing the amount thereof), that the justice has no right to enter judgment thereon for plaintiff for the amount claimed, but should direct the jury to retire and reform their verdict; and that a judgment so entered by the justice should be set aside by writ of error from the circuit court, and the cause be remanded (under Sec. 3603 of the Code of 1860) to the justice's court for another trial.

Reaffirmed and extended in Bank of Monroe v. Gifford, 79 Iowa 310, 44 N. W. 561, holding further that where a jury inadvertently fails to answer a material point required to be answered, in a special finding returned by them it is not error for the court to direct them to retire and make their finding definite in reference thereto.

Reaffirmed and extended in Oxford Junction Sav. Bank v. Cook, 134 Iowa 191-194, 111 N. W. 808, holding further that in a case as mentioned in the text, it is not improper for the jury to retire and correct their verdict so as to state the *amount* or *value* of collaterals for which it was admitted that the party for whom the verdict was returned was entitled to recover, if entitled to recover at all.

(Note.—The decisions under this Rule were decided under the various codes of 1860, 1873, and 1897.—Ed.)

Cross references. See further on this question, annotations under Hamilton v. Barton, (20 Iowa 505); Morrison v. Overton (20 Iowa 465); Rule 5 of Fromme v. Jones (13 Iowa 474); Rule 1 of Cassel v. Western Stage Co. (12 Iowa 47), Vol. II, pp. 854, 845, 176, and 7, respectively.

PIPER v. NEWCOMER & CAMPBELL, 25 IOWA 221

1. Principal and Surety—Evidence—Suretyship, How May be Shown.—The fact that a person is a surety on a note or other obligation may be shown by extrinsic or even parol evidence, when it is not disclosed by the instrument itself, p. 222.

Reaffirmed and extended in Fullerton Lumber Co. v. Snouffer, 139 Iowa 178, 179, 117 N. W. 51, holding further that (under the Negotiable Instrument Act, Code Supplement of 1907), one of the makers of a negotiable note when sued by the payee may show by parol that he was in fact a surety thereon, although appearing thereon as principal, and that the time of payment thereof was extended without his consent, thus discharging him.

Cross references. See further on this question. annotations under Rules 2-4 of Chambers v. Cochran and Brock (18 Iowa 159); Corielle v. Allen (13 Iowa 289); Kelly v. Gillespie (12 Iowa 55), Vol. II, pp. 606, 151, and 9, respectively.

CHAMBERS v. INGHAM, 25 IOWA 222

1. Appeal in Equity Cause—Trial De Novo—Effect of Special Findings by Jury.—Upon an appeal to the Supreme Court in an

equity action tried according to the first method provided by Sec. 2999 of the Code of 1860, the case will be tried *de novo* when all the evidence is properly certified, although there was a special finding of facts by a jury; as such special finding has no conclusive weight, and is to be accepted or rejected as the court considers equitable, p. 225.

Reaffirmed and qualified in Frank v. Hollands, 81 Iowa 167, 46 N. W. 980, holding, however, that under the Code of 1873, issues of fact are to be tried by the court without reference to a jury.

PALMER v. BLAIR, ADMINISTRATOR, 25 IOWA 230

1. Homestead—Exchange of by Husband for Other Land—Action in Equity by Widow to Sell Land Exchanged and Invest in Homestead—Parties.—Where a husband exchanged homestead for unimproved land not suitable to be occupied as a homestead, his widow cannot maintain an action in equity against the husband's administrator for a sale of the exchanged land and the investment of the proceeds in another homestead, without making the children of her decedent husband parties to the action, p. 231.

Cited in Busse v. Schaeffer, 128 Iowa 324, 103 N. W. 949, the court holding that—under Sec. 3466 of the Code of 1897—when a determination of a controversy between the parties before the court cannot be made without the presence of other parties, the court must order them to be brought in; but that when persons who are proper but not necessary parties are not made parties, the party desiring them brought in must bring them in.

Special cross reference. For further cases citing the text, and others in this connection, see annotations under Burns v. Keas (21 Iowa 257), Vol. II, p. 900.

STATE v. PRINE, 25 IOWA 231

1. Roads and Highways—Public or County Road—Establishment of—Notice—Sufficiency of Finding of Court and Record Entry as to.—Where in a proceeding to establish a public or county road, under the Code of 1851, the county court, upon presentation of the petition finds that there has been proper notice given, which finding is entered of record, it is sufficient—under Secs. 519, 523 of the Code of 1851—to show that the court acquired jurisdiction by proper notice, p. 233.

Special cross reference. For cases citing, sustaining, etc., the text, and many others on the question, see annotations under Rule 2 of McCollister v. Shuey (24 Iowa 362), ante. p. 198.

STATE v. WEBB, 25 IOWA 235

1. Criminal Law—Nuisance—Disorderly House—Indictment for—Evidence to Convict.—Upon the trial of an indictment, under

Sec. 4411 of the Code of 1860, for keeping a disorderly house in which quarreling, fighting and drunkenness and breaches of the peace were carried on, the accused may be convicted upon evidence that the quarreling, fighting, etc., occurred either in the building, or on the sidewalk in front of it, if it was the character of the house which attracted the disorderly persons there, and which caused the disturbances in and around it, pp. 236, 237.

Reaffirmed in State v. Pierce, 65 Iowa 89, 21 N. W. 197, under Sec. 4091 of the Code of 1873.

STATE v. CONLEE, 25 IOWA 237

1. Indictment—Sufficiency of Allegations—Language Conveying Meaning to Common Understanding.—When the language of an indictment is sufficient to convey to a person of common understanding that which is meant to be charged, it is sufficient under the Code of 1860, p. 241.

Special Cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Rule 1 of State v. Hessenkamp (17 Iowa 25), Vol. II, p. 483.

2. Criminal Law—Act Prohibited by Statute When No Penalty Fixed, a Misdemeanor—Malfeasance of Officers.—Where an act is prohibited by statute but no penalty is fixed for violation of the prohibition and the commission of or doing of the act, the commission thereof is a misdemeanor under Sec. 4302 of the Code of 1860, and is punishable, under Sec. 4303 of that Code, by imprisonment in the county jail for not more than one year, or by a fine of not exceeding five hundred dollars, or both. This rule applies to acts forbidden by statute to be done by public or municipal officers, pp. 241, 242.

Reaffirmed in State v. Shea, 106 Iowa 737-739, 72 N. W. 301, under Secs. 3966 and 3967 of the Code of 1873.

Reaffirmed in State v. York, 131 Iowa 639-642, 109 N. W. 124, under Secs. 4905, 4906 of the Code of 1897.

MONTICELLO BANK v. SMITH, 25 IOWA 246

1. Injunction—Appeal to Supreme Court from Order of County Judge Dissolving.—Under the Code of 1860, no appeal lies to the Supreme Court from an order of the county judge dissolving an injunction, pp. 248, 249.

Cited in In re Curley, 34 Iowa 188, 189, the court holding that an appeal can only be taken when allowed by law; and that an appeal does not lie in a *habeas corpus* proceeding had before a judge of the Supreme or of the circuit court, it not being allowed by law.

Cited in Jones v. Ch. & N. W. R. R. Co., 36 Iowa 73, not in point.

Partially overruled in Jewett v. Squires, 30 Iowa 92-94, holding that under Chap. 86, Laws of Twelfth General Assembly (1868) creating the circuit court, an appeal lies to the Supreme Court from an order of the circuit court, made while court is in session, dissolving an injunction, but not when the order is made in vacation or in chambers.

Overruled in Bennett v. Hetherington, 41 Iowa 149, holding that under Secs. 3163-3165 of the Code of 1873, an appeal lies to the Supreme Court from an order of *any judge* allowing or refusing to allow an injunction.

HUNTINGTON, WADSWORTH & PARKS v. JEWETT, TIBBETS & CO., 25 IOWA 249, 95 AM. DEC. 788

1. Ejectment or Action of Right to Recover Land—Plaintiff to Recover on Strength of His Own Title.—In an action at law of ejectment or right, to recover real estate, the plaintiff must recover upon the strength of his own title and not upon the weakness of that of the defendant. And in such case where both parties claim the legal title to the land, the plaintiff must show the legal title to be in him, pp. 250, 251.

See 150 Iowa 498, not yet published, citing this rule.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

2. Res Adjudicata—Conveyance Adjudged Fraudulent as to Certain Creditors of Grantor—Effect on Others and Third Persons Not Parties.—A judgment that a conveyance is fraudulent as to certain creditors (plaintiffs in the action) is not evidence that it is fraudulent as to other creditors of the grantor or other persons who were not parties to the action wherein the judgment was rendered, p. 251.

Reaffirmed and explained in Stoddard v. Burton, 41 Iowa 585, holding that in order for a plea of *res adjudicata* to be available in a subsequent action, the former adjudication must be *between the same parties* and have the effect of estopping both parties as to matters therein involved.

Unreported citation, 129 N. W. 489.

Cross reference. See further on this question, annotations under Rule 1 of Myers v. Johnson County (14 Iowa 47), Vol. II, p. 203.

BOYD v. FIRST NAT'L BANK OF OSKALOOSA, 25 IOWA 255

1. Trial—Evidence—Witnesses—Corroboration of by Previous Consistent Statements, When and When Not Allowed.—As a general rule a witness cannot be corroborated by proof that he made statements consistent with his testimony prior to his testifying: But such declarations of a witness are admissible where it is claimed that

his relation to the case or parties interested discredits him, or, on account of such relations, he designedly makes false statements, and it is shown that the declarations agreeing with his evidence were made before such relations existed, p. 257.

Special Cross reference. For cases citing, sustaining and explaining the text, and others, see annotations under Rule 2 of State v. Vincent (24 Iowa 570), ante. p. 221.

2. Trial—Evidence—Witnesses—Bill of Exceptions of Former Trial to Contradict or Impeach.—A bill of exceptions [prepared under the old practice without a shorthand report of the evidence] of the evidence of a former trial is inadmissible to contradict the testimony or impeach a witness upon a subsequent trial, pp. 258-260.

Reaffirmed and extended in Case & Co. v. Burrows, 54 Iowa 681, 682, 7 N. W. 132, holding further that a shorthand reporter's transcript of evidence of a former trial is not admissible to contradict or impeach the testimony of a witness given at a subsequent trial, when it does not appear that the transcript contains the evidence of the former trial of the same case, that it was made of record therein, and when it does not further appear that the former contradictory testimony was as to the same fact as the subsequent testimony sought to be thereby contradicted or impeached—The court saying, however, that "we do not determine whether with proper identification the testimony of a witness upon a former trial taken by a shorthand reporter, and which has been made part of the record, can be introduced as impeaching evidence."

Cited in State v. Hull, 26 Iowa 297, the court holding that the minutes of testimony (not read over to or signed by the witnesses) taken by a justice of the peace at a preliminary examination in a criminal prosecution, and used as evidence by accused upon the trial of the indictment, are not conclusive upon the State as to what the witnesses testified to upon the preliminary examination—But the court says "we give no opinion as to the admissibility, when objected to, of such minutes as original, or as impeaching evidence."

Partially overruled in Connell v. Connell, 119 Iowa 603, 93 N. W. 582, holding that under Chap. 9, Acts of Twenty-seventh General Assembly, (1898) a transcript of the evidence taken by a shorthand reporter at a former trial of the same case may be used as evidence upon the re-trial of the same case, and, for purpose of impeachment *in any case*, if the certificate of verification of such transcript shows that it contains "the whole of the evidence of the witness" sought to be thereby contradicted, but under no other circumstances.

BUTTERFIELD v. WALSH, 25 IOWA 263

(Former Appeal, 21 Iowa 97; Later Appeal, 36 Iowa 534.)

1. Ejectment or Action of Right—Appeal—Reversal—Entry of Judgment Below on—New Trial.—The appeal in an action of right,

reversal of the judgment thereon, and entry of the judgment below pursuant to the opinion of the Supreme Court, does not deprive the unsuccessful party of the right to apply for a new trial within the two years allowed by Sec. 3584 of the Code of 1860, pp. 264, 265.

Reaffirmed and qualified in Bevering v. Smith, 121 Iowa 610-612, 96 N. W. 1111, holding that an affirmance on motion of a judgment in an action for the recovery of real estate does not preclude the appellant from applying for a new trial in the court below within the statutory period allowed therefor, and for grounds not presented below before the appeal.

Unreported citation, 90 N. W. 841.

BLYTHE v. BLYTHE, 25 IOWA 266

1. Divorce and Alimony—Alimony, When Allowed—Marriage Relation to be Shown to Exist.—In order to justify the allowance of alimony the marriage relation between the plaintiff and the defendant must exist either *de jure* or *de facto*, p. 268.

Reaffirmed and explained in Shaw v. Shaw, 92 Iowa 724, 725, 61 N. W. 369, holding that as a general rule, the allowance of alimony either temporary or permanent, is based upon the existence of the marital relation; and, if such relation is not admitted or established by satisfactory evidence, there can be no allowance made: But that upon the question of allowing temporary alimony the court has the power, from the pleadings, affidavits, and other proofs presented to it, to pass upon the question for the purposes of the application, and is not bound by the allegations of the petition and the denials of the answer, if other proofs submitted to him make out a fair presumption of the fact of the existence of the marriage relation.

(Note.—See further Smith v. Smith, 61 Iowa 140, 15 N. W. 867; McFarland v. McFarland, 51 Iowa 567, 2 N. W. 269; Wilson v. Wilson, 49 Iowa 545; York v. York, 34 Iowa 530, some important cases sustaining and explaining, but not citing, the text.—Ed.)

2. Divorce and Alimony—Decree for Alimony—Power of Court to Change.—Under Sec. 2537 of the Code of 1860, the court granting a divorce and alimony has a right to change the decree concerning alimony, only where there has been a change in the circumstances which demands that the decree be changed; and such section does not authorize the court to grant a new trial or re-try the case as to alimony, pp. 268, 269.

Reaffirmed in Wilde v. Wilde, 36 Iowa 321-323.

Reaffirmed in Ferguson v. Ferguson, 111 Iowa 160, 82 N. W. 490; Graves v. Graves, 132 Iowa 206, 207, 10 L. R. A. (New Series) 216, 10 Am. & Eng. Ann. Cas. 1104, 109 N. W. 707; Crockett v. Crockett, 132 Iowa 391, 106 N. W. 944, under Sec. 3180 of the Code of 1897, corresponding to the section of the text.

Reaffirmed and extended in Reid v. Reid, 74 Iowa 682, 683, 39 N. W. 102, holding further—under Sec. 2229 of the Code of 1873, corresponding to the section of the text that where a divorce is granted, and a decree is entered allowing a wife alimony, and the custody of her child, she cannot thereafter maintain a supplementary proceeding to obtain from her husband an additional sum for the support of the child, without she therein shows that the circumstances have so changed as to render the additional relief proper and equitable.

Cited with approval in Shaw v. McHenry, 52 Iowa 186, 2 N. W. 1099, the court holding that where a decree of divorce grants the custody of a child to the wife who thereafter places it in the custody of a third person, that the father or the child by him as next friend, cannot under a writ of *habeas corpus*, obtain the custody of the child from the third person, or have it placed in the custody of another: That a decree or order in an action of divorce respecting the custody of children cannot be obstructed, changed, modified or revoked in a collateral proceeding.

Cited in Zuver v. Zuver, 36 Iowa 198, the court reviewing previous cases in this state concerning alimony.

And see 148 Iowa 263, 126 N. W. 111; 150 Iowa 228, 129 N. W. 827.

STATE v. TAYLOR, 25 IOWA 273

1. Larceny—Evidence of Guilt—Possession of Stolen Property.—The possession of stolen property if unexplained is *prima facie* evidence of the guilt of the one in whose possession it is found soon after the larceny. But in order to raise the presumption of guilt by the possession by accused of the property of another, the fact that it had been recently stolen must be established, pp. 274, 275.

Reaffirmed in State v. Walker, 41 Iowa 218; State v. Hessians, 50 Iowa 137, 138.

Reaffirmed and explained in State v. Kelly, 57 Iowa 646, 10 N. W. 890, holding that the recent, unexplained possession of stolen property tends to establish the guilt of the person in whose possession it is found, and will authorize conviction, unless the inference of guilt is overcome by other facts tending to establish the innocence of the accused: That this presumption may be overcome by evidence of facts inconsistent with guilt; and good character is sufficient in some cases.

Reaffirmed, explained and extended in State v. Golden, 49 Iowa 49, 50; State v. Ryan, 113 Iowa 539, 85 N. W. 813, holding that upon the trial of an indictment for burglary with intent to commit larceny, where the State introduces independent proof of the breaking and larceny, this, together with proof of the possession of the stolen goods by accused immediately after the burglary, is sufficient to authorize a conviction, unless the accused satisfactorily explains the lawfulness of his possession thereof.

Cross reference. See further on this question, annotations and note under Rule 4 of State v. Reid (20 Iowa 413), Vol. II, p. 833.

STATE FOR USE OF BOONE AND OTHER COUNTIES v. ORWIG, 25
IOWA 280

1. Equity Practice—Reference to Master or Referee—Actions Triable by First Method of Sec. 2999 of the Code of 1860—Action to Foreclose Mortgage.—Where an action involves matters of purely original equitable cognizance, it is to be tried by the first method prescribed by Sec. 2999 of the Code of 1860 (written evidence), although it involve as one of the incidents to relief, the foreclosure of a mortgage. And in all such cases the chancellor may—under Sec. 3000 of the Code of 1860—refer the cause to a master or referee without the consent of the parties, pp. 285, 286, 289.

Cited in Richards v. Burden, 31 Iowa 309, on the question of what orders may be appealed from.

Distinguished in Hobart v. Hobart, 45 Iowa 503, 506, holding that an action of divorce cannot—under the Code of 1873—be referred to a master or referee, even when the parties agree thereto.¹

2. Equitable Actions Tried by First Method of Sec. 2999 of the Code of 1860—Right to Jury Trial.—Where an equitable action is tried according to the first method provided by Sec. 2999 of the Code of 1860, a party thereto cannot demand a jury trial as a matter of right, p. 289.

Reaffirmed in Clough v. Seay, 49 Iowa 113.

Cited in Sisson v. Board of Supervisors of Buena Vista County, 128 Iowa 460, 70 L. R. A. 440, 104 N. W. 454, the court holding that within the meaning of the Constitution, the right of trial by jury extends only to those cases where a jury was necessary according to the course of procedure at Common Law.

Cited in Littleton v. Fritz, 65 Iowa 491, 54 Am. Rep. 19, 22 N. W. 643, not in point.

Unreported citation, 124 N. W. 769.

JONES v. BERRYHILL, 25 IOWA 289

1. Practice—Interrogatories—When to be Filed—Striking from File When Filed Too Late.—When the petition has been filed for several months it is not error for the court to strike from the files interrogatories filed after a case is called for trial; especially when not to so do will work a continuance, p. 292.

Reaffirmed and qualified in Theis v. Ch. & N. W. Ry. Co., 107 Iowa 525, 78 N. W. 200, holding that where after an issue has been joined and a cause set for trial, the plaintiff has no right to file an amended and substituted petition with interrogatories attached, to answer which will postpone the trial, and the plaintiff not offering an

excuse for his delay: And that in such case the court should sustain exceptions to such interrogatories.

2. Usury—What Necessary to Constitute.—In order to constitute usury there must be an agreement by the debtor to pay and the creditor to receive usurious interest for a loan or the use of money or on a debt, p. 295.

Reaffirmed in Weaver v. Burnett, 110 Iowa 569, 81 N. W. 771.

3. Negotiable Instruments—Accommodation Paper—Liability of Maker or Guarantor.—The maker, or guarantor of accommodation paper is liable to a good faith indorsee thereof, for value, although the latter takes with notice of the want of consideration, pp. 299, 300.

Reaffirmed in Bankers Iowa State Bank v. Mason Hand Lathe Co., 121 Iowa 572, 90 N. W. 613.

Reaffirmed and extended in Winters v. Home Ins. Co., 30 Iowa 174, 175, holding further that fraud in obtaining the signature to an accommodation paper cannot be pleaded as a defense to an action thereon by a *bona fide* holder, who obtained it for value and before maturity, without knowledge of the fraud: Holding, also, that any holder of such paper, including the maker, may transfer it by delivery.

Cross reference. See further on this question, annotations under Trustees of Iowa College v. Hill (12 Iowa 462), Vol. II, p. 75.

FOSTER v. MARSH, 25 IOWA 300

1. Vendor and Purchaser—Purchaser Agreeing to Pay Judgment against Vendor as Part of Purchase Price—Limitation of Actions.—Where a purchaser of land, as part of the purchase price, agrees to pay a certain judgment against his vendor, the purchaser becomes, in equity, as between himself and his vendor, the principal debtor as to such judgment, and his vendor becomes his surety: And when no time is fixed for the purchaser to pay the judgment, and the vendor thereafter pays it, upon the purchaser failing to so do, he may sue the latter therefor at any time within five years from the date of his so paying, from which date the statute of limitation commences to run, pp. 303, 304.

Cited in Russell & Co. v. Polk County Abstract Co., 87 Iowa 241, 43 Am. St. Rep. 381, 54 N. W. 214, the court holding that in cases of contract, the statute of limitation commences to run, as a general rule, from the breach thereof; and that this is the rule although special damage arises after the breach.

INDEPENDENT SCHOOL DISTRICT OF GRANVILLE v. BOARD OF SUPERVISORS, 25 IOWA 305

1. Schools—Organization of Independent Districts—What Territory May be Included in—Territory in Different Counties—Elec-

tion—Notice.—Under Chap. 172, Acts of 1862, as amended by Chap. 143, Acts of 1866, any city, town or sub-district having not less than two hundred inhabitants, and territory contiguous thereto, may organize into a separate school district, by a vote of the electors of the proposed district, at an election to be called as provided by such laws.

If such school district is formed of parts of two or more civil townships in the same or adjoining counties, the duty of giving notice as provided by law shall devolve upon the trustees of the township where a majority of the legal voters of the *contemplated district* reside, p. 306.

Reaffirmed and explained in Dist. Township of Union v. Indep. Dist. of Greene, 41 Iowa 33, holding that under Sec. 1800 of the Code of 1873, the only restrictions here placed upon the organization of independent districts are that the city or town so organizing shall contain not less than three hundred inhabitants, and that the included territory shall lie contiguous: That an independent school district may be formed of parts of adjoining counties or of two or more civil townships in the same or adjoining counties forming contiguous territory; and that in such last cases the board of directors of the township or townships in which a majority of the legal voters of the contemplated district reside, shall—under Sec. 1805 of the Code of 1873—give the notice required by law in such cases.

Cited in Independent Sch. Dist. of Lowell v. Independent Sch. Dist. of Duser, 45 Iowa 394, not in point; but the case involving the distribution of assets and liabilities of a district township among independent districts which succeed it, and made by the board of directors of the district township as provided by Secs. 1715 and 1820 of the Code of 1873—The court holding that in such case and in all cases involving questions of law or of fact, an appeal lies to the county superintendent from the decision of the board of directors.

Cross reference. See further on this question, annotations under Fort Dodge School Dist. v. Dist. Township of Waukama (17 Iowa 85), Vol. II, p. 499.

BARLOW, WOOD & CO. v. BROCK, 25 IOWA 308

1. **Appeal and Error—Defenses Not Pleaded Below.**—Defenses which could have been taken advantage of below, either by demurrer, or by plea, cannot be raised for the first time in the Supreme Court, pp. 310, 311.

Reaffirmed in McClintock v. Sutherland, 35 Iowa 490; Stanberry, Gibson & Stanberry v. Dickerson, 35 Iowa 494; Wilhelmi v. Des Moines Ins. Co., 86 Iowa 330, 53 N. W. 234; Wilson v. Riddick, 100 Iowa 706, 69 N. W. 1041.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

THE NATIONAL STATE BANK OF OSKALOOSA v. YOUNG, TREASURER,
25 IOWA 311

1. Taxation and Revenue—National Banks—Taxation of Its Property and Stock—To What Extent Allowed.—All property of national banks, except real estate, is exempt from state, county and municipal taxes, the taxation of the shares in the hands of the stockholder being in lieu thereof, pp. 312, 313.

Reaffirmed in First Nat'l Bank of Albia v. City Council of City of Albia, 86 Iowa 30-33, 52 N. W. 334.

Cited in Judy, county treasurer v. Beckwith, et al, Ex'rs, 137 Iowa 32, 15 Am. & Eng. Ann. Cas. 890, 114 N. W. 568, the court holding that the shares of a testator in a foreign corporation are to be assessed at the place of his residence in this State at the time of his death, although they may have been assessed for taxation in the state of such corporation's residence, such not being "double taxation"—The court saying: "Each state is sovereign within its own territorial jurisdiction, and its power to tax any and all property therein, except such as is in actual transit through it, cannot be taken away, limited or lessened by the act of the taxing authorities of any other state. * * * A double taxation is where the second or additional burden is imposed by the same sovereignty which imposed the first."

Cross reference. See further on this question, annotations under Hubbard v. Board of Supervisors of Johnson County (23 Iowa 130), ante. p. 88.

CLAPP v. WALKER & DAVIS, 25 IOWA 315

1. Garnishment — Municipal Corporations Exempt from — Waiver of Exemption.—A municipal corporation is exempt from garnishment under Sec. 3196 of the Code of 1860; but this is a privilege which it may insist upon or waive as it deems best, p. 316.

Reaffirmed and explained in Tone Bros. v. Shankland, 110 Iowa 527, 81 N. W. 789, holding that under Sec. 3936 of the Code of 1897, corresponding to the section of the text, a municipal corporation which is garnished can plead the exemption; but that no one else can plead or rely thereon—The case, however, turning upon other questions.

Distinguished and explained in Jenks v. Osceola Township, 45 Iowa 555, 556, holding that Sec. 2976 of the Code of 1873, corresponding to the section of the text, exempting municipal corporations from garnishment, applies to all cases, and not only to those which will interfere with its exercising its corporate powers and duties: And holding, also, that where a municipal corporation is garnished, and the action is referred to a commissioner to ascertain the indebtedness, the garnishee, corporation, need not claim the exemption before the commissioner, but may do so after he reports, by answer or by a motion to discharge the attachment on the ground of such exemption.

ASPINWALL *v.* BLAKE, 25 IOWA 319

1. Contracts and Notes—Interest—When May be Recovered Separately from Principal—Interest on Interest, When Allowed.—Although the time when interest upon a contract is due and recoverable may be fixed by the parties to it and is under their control still, if no time is fixed for its payment it can be recovered only with the debt and not separately: And there is no implied contract binding the debtor to pay interest on interest after the principal becomes due.

The law, says the court, may permit the recovery of compound interest under special contract, or, in a case where the time of the payment of interest is fixed by contract, will allow interest on interest after its maturity, but such contracts are not so favored as that their existence will be presumed, p. 320.

Reaffirmed and extended in Rew *v.* Indep. Sch. Dist. of Sioux City, 125 Iowa 38, 39, 106 Am. St. Rep. 282, 98 N. W. 806, holding further that a clause in a contract, or note, for the payment of money providing that there shall be interest upon interest in semi-annual rests, does not allow interest upon the interest allowed by law after the maturity of the interest, in the absence of an express stipulation therefor therein.

(Note.—See further, White *v.* Savery, 50 Iowa 515; Preston *v.* Walker, 26 Iowa 205, some important cases in this connection, not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Mann *v.* Cross (9 Iowa 327), Vol. I, p. 584.

ROBINSON *v.* KEITH & SNELL, 25 IOWA 321

1. Appeal—Harmless Error—Evidence—Erroneous Exclusion of, When Not Cause for Reversal.—A judgment will not be reversed because of the erroneous exclusion by the trial court of evidence, which, if it had been admitted, could not have changed the verdict of the jury, p. 322.

Reaffirmed and explained in Hunter *v.* Davis, 128 Iowa 218, 103 N. W. 374, holding that where plaintiff sues upon a contract and the defendant denies the execution of the contract, and on the trial of the issue the jury find the existence of the contract as claimed by plaintiff, the fact that the trial court refused to allow the defendant to introduce proof of a set-off based upon a theory other than the existence of the contract, does not constitute prejudicial or reversible error upon appeal.

(Note.—See further, Rosenberger *v.* Marsh, 108 Iowa 47, 78 N. W. 837; Mayne *v.* Council Bluffs Sav. Bank, 80 Iowa 711, 45 N. W. 1057, important cases sustaining, but not citing, the text.—Ed.)

2. Detinue for Value of Personal Property Converted—When Demand Unnecessary before Commencing Action.—The owner of personal property may maintain an action of detinue for its value

against any person or persons who are guilty of its unlawful conversion; and if the taking by the defendant was wrongful, no demand for its return is necessary before commencing the action, pp. 322, 323.

Unreported citation, 133 N. W. 745.

Special Cross reference. For further cases citing and sustaining the text, and others on the question, see annotations under Rule 2 of *Smith & Co. v. McLean* (24 Iowa 322), ante. p. 187.

3. Detinue—Action of—Parties—Attaching Creditors.—In an action of detinue for the value of property wrongfully or illegally seized by a sheriff under an attachment, the attaching creditors are properly made defendants along with the sheriff; and when they appear in such action and attempt to justify under the act or acts of the officer, they are equally liable with him, although they had no *actual* knowledge of the seizure of the property by the officer under the writ, p. 323.

Special Cross reference. For cases citing the text, and many others intimately connected herewith, see annotations under Rule 2 of *Campbell v. Chamberlain* (10 Iowa 337), Vol. I, p. 698.

MILLER v. CASADY, 25 IOWA 323

1. Contracts—Breach of—Damages—Measure of.—In an action for damages for breach of a contract for the storage of wheat, where it appears that the plaintiff stored a quantity of wheat for several years, being the crops of the several years, and was to receive a certain number of bushels for the storage, the plaintiff may recover the price of the wheat he was to receive, according to the market price of the wheat when the storage was completed each year, and not according to the market price as of a date he demanded performance of the contract of defendant for the price of the full amount of the wheat after the entire storage was completed, p. 327.

Cited in *Cobb, Blasdel & Co. v. I. C. R. R. Co.*, 38 Iowa 631, the court holding that in an action by the seller of personal property against a common carrier for failing and refusing to transport it to a distant place where it was to have been delivered at a given time, the measure of damages is the difference in its value in the place where it was offered for transportation, and the contract price for which it was sold, less the freight charges to the place where it was to have been delivered.

Cross reference. See further on this question, annotations under Rule 2 of *Boies & Barrett v. Vincent* (24 Iowa 387), ante. p. 203.

BONHAM v. IOWA CENTRAL INS. CO., 25 IOWA 328

1. Fire Insurance—Over-Valuation of Property by Insured—Effect on Policy—Fraud.—When a policy of fire insurance provides that the insurer shall be only liable for two-thirds the value of the

property in case of loss, the amount of loss to be estimated according to the actual cash value of the property at the time of loss, the fact that the insured over-values the property insured in the application for the policy, does not defeat recovery in case of loss.

And it would seem that the fact that insured, in any case, over-values his property in an application for a policy of fire insurance, will not affect its validity, or defeat recovery in case of loss, in the absence of an express stipulation in the policy, or such facts as will constitute fraud, pp. 332, 333.

Reaffirmed and explained in Behrens v. Germania Fire Ins. Co., 64 Iowa 22, 19 N. W. 839, holding that over-valuation although great, by insured of his property insured, will not affect the validity of a fire insurance policy or defeat recovery, in the absence of actual fraud; and especially where the loss is to be estimated according to the actual cash value of the property at the time it is damaged or destroyed.

Reaffirmed and explained in Helm v. Anchor Fire Ins. Co., 132 Iowa 184, 109 N. W. 607, holding that in order for an over-valuation by insured of his property insured to vitiate the policy, it must have been made willfully and with an intention to deceive, must have in fact deceived insurer, and have amounted to fraud.

2. Fire Insurance—When Insured Considered Absolute Owner of Property Not All Paid for—Misrepresentations as to Title by Insured, What Is Not.—If insured has, previous to the issuance of a policy of fire insurance, purchased and partly paid for property insured, is in possession thereof, and there is no lien for purchase money or other incumbrance thereon, at such time, he is, although it has not been deeded to him, the *absolute and sole owner* of the property, within the meaning of the term as used in the policy; and his statement in the application for such insurance to such effect is not misrepresentation of title, p. 335.

Reaffirmed and varied in McCoy v. Iowa State Ins. Co., 107 Iowa 84, 77 N. W. 530, holding that when the agent of insurer knows that the *naked legal title* to the property insured is in another than insured at the time of the issuance of the policy, the company cannot rely upon such fact to defeat recovery for loss by insured, who is the beneficial owner at the time of the issuance of the policy.

Reaffirmed and varied in Keane v. Century Fire Ins. Co., 150 Iowa 663, 130 N. W. 726, holding that where at the time of the issuance of a policy of fire insurance the recording agent of insurer knows the condition of the title of insured and attempts to write such a policy as will cover the interest of insured, whether absolute or in trust, the insurer is there by estopped from claiming, when sued on the policy, that insured had no insurable interest, or that the policy never was valid because of the clause therein relating to the nature and character of the title held by insured.

Cited in McCoy v. Iowa State Ins. Co., 107 Iowa, 84, 77 N. W. 530, the court holding that if insured is the beneficial owner of the property insured at the time the policy of fire insurance is issued thereon, the fact that the *naked legal title* is then in another will not defeat recovery by insured in case of loss, although the policy contains a condition that "if the interest of the assured be an * * * interest not absolute, it must be so stated in the policy; otherwise the same shall be void."

3. Trial—General and Special Verdict—Special Verdict to Prevail Where General Is Inconsistent with—Fact to Appear Affirmatively—Practice.—Although a special verdict will—under the Code of 1860—be taken over and cause a general verdict to be disregarded when the latter is inconsistent therewith, yet the inconsistency must, in order to have such effect, appear affirmatively from the special verdict, and will never be presumed, pp. 334, 335.

Reaffirmed and explained in Clark v. Warner, 32 Iowa 220, holding that in order to defeat a general verdict, the special verdict must be manifestly inconsistent therewith.

Reaffirmed and explained in Mershon v. Nat'l Ins. Co., 34 Iowa 90; Close v. Atkins, 39 Iowa 522, holding that to justify a judgment upon a special verdict contrary to the general verdict, it must affirmatively appear that the latter is inconsistent with the former.

Reaffirmed and explained in Cooper v. McKee, 53 Iowa 242, 5 N. W. 124, holding that when under a special verdict the plaintiff has no cause of action, a general verdict in his favor will—under the Code of 1873—be disregarded, and judgment be entered for defendant upon the special verdict.

Reaffirmed and explained in Fishbaugh v. Spunaugle, 118 Iowa 344, 345, 92 N. W. 61, holding (decision under the Code of 1897) that in order to warrant a judgment upon special findings against a general verdict, the former must be necessarily and absolutely inconsistent with the latter.

Cited in Helphrey v. Ch. & R. I. R. R. Co., 29 Iowa 483, the case turning upon the *sufficiency* of a verdict general or special.

(Note.—There are many other cases sustaining, but not citing, the text, and decided under the various codes.—Ed.)

Cross reference. See further on this question, annotations and note under Lamb v. First Presbyterian Society of Marshalltown, (20 Iowa 127), Vol. II, p. 789.

4. Trial—Practice—Special Verdict—On What Fact Not Required.—It is not error for the court to refuse to require the jury to return a special verdict or finding upon an immaterial fact, p. 336.

Reaffirmed and explained in Phoenix v. Lamb, 29 Iowa 355, holding that under Sec. 3079 of the Code of 1860 (the section in force at the time the text was decided) a party is only entitled to a special

verdict upon material facts in issue; and the questions submitted must be in such form as to elicit from the jury, only conclusions of fact as established by the testimony, and not a statement of the evidence adduced upon the trial, or conclusions of law.

Reaffirmed and explained in O'Leary Bros. v. German American Ins. Co., 100 Iowa 399, 69 N. W. 689, holding—under Secs. 2807 and 2808 of the Code of 1873—that immaterial facts are not to be submitted to a jury for a special verdict, nor are questions of fact to be submitted that are not ultimate in their nature and may not be answered by "yes" or "no" or in some other brief and pertinent manner; and that the questions submitted must each embrace a single fact, and not conclusions based upon many facts.

Reaffirmed and explained in Read & Traversy v. State Ins. Co., 103 Iowa 318, 319, 64 Am. St. Rep. 180, 72 N. W. 668, holding that under Sec. 2807 of the Code of 1873, questions of fact on which a jury is to be required to return a special verdict are to be of material and ultimate facts; that is they must be such as inhere in and are necessary to determine in arriving at the general verdict: And that the method or elements considered in reaching the ultimate facts cannot be submitted for special finding.

Reaffirmed and extended in White v. Adams, 77 Iowa 298, 42 N. W. 200; Scagel, Adm'r, v. Ch. M. & St. P. Ry. Co., 83 Iowa 386, 49 N. W. 992, holding further that a jury should not be required to make a special verdict or finding upon immaterial questions.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

MOORE v. LOWREY, GARNISHEE, 25 IOWA 336, 95 AM. DEC. 790

1. Contracts, Debts, Choses in Action—Assignment of May be Verbal or Written—Requisites—Parol Evidence.—An assignment of a debt, contract or chose in action may be either verbal or written. No particular form is necessary therefor, it being sufficient if the intention of the parties be clearly shown.

Where such an assignment is in writing and the instrument does not manifest the intention of the parties, the fact that it was intended as an assignment may be shown by evidence *aliunde* or even by parol, p. 339.

Reaffirmed in Des Moines County v. Hinkler & Norris, 62 Iowa 643-645, 17 N. W. 917, 918; Foster v. Ternary, 65 Iowa 622, 623, 22 N. W. 899; Metcalf v. Kincaid, 87 Iowa 445, 43 Am. St. Rep. 391, 54 N. W. 868; Hoffman v. Smith, 94 Iowa 498, 63 N. W. 183; Ruthven Bros. v. Clarke, 109 Iowa 28, 79 N. W. 455; Seymour v. Aultman & Co., 109 Iowa 298, 299, 80 N. W. 402.

Reaffirmed as to first paragraph in Howe & Co. v. Jones, 57 Iowa 140, 141, 8 N. W. 456; Tone v. Shankland, 110 Iowa 527, 81 N. W. 789.

Reaffirmed as to first paragraph in Barthol v. Blakin, 34 Iowa 453, holding, also, that the assignee of a contract or debt (in this case a mortgage) may maintain an action thereon in his own name.

Reaffirmed and explained in Warnock v. Richardson, 50 Iowa 451, holding that the holder of a negotiable note may maintain an action thereon, though it has not been indorsed to him, by showing that he was the owner under an assignment made otherwise than by indorsement.

Reaffirmed and extended in McWilliams v. Webb & Son, 32 Iowa 580, holding further that an order drawn on the whole of a particular fund amounts to an equitable assignment of the fund; and that after notice to the drawee it binds the funds in his hands.

Cited in Kuhness v. Cahill, 128 Iowa 597, 104 N. W. 1026, the court holding that the giving of a check drawn upon a general deposit fund in a bank amounts to an equitable assignment *pro tanto* of such fund; and that the drawee has priority over a creditor of the drawer subsequently attaching the fund.

Distinguished and narrowed as to last paragraph in Benson v. Haywood, 86 Iowa 111, 23 L. R. A. 335, 53 N. W. 85, holding that where an assignment of a debt, contract, or chose in action is in writing, and the intention of the parties is clear and manifest from the instrument itself, it may not be varied or contradicted by parol evidence, in the absence of an allegation and proof of fraud or mistake.

Cross reference. See further on this question, annotations under Rule 2 of Conyngham v. Smith (16 Iowa 471), Vol. II, p. 458.

2. Contracts, Debts, Choses in Action—Assignment as Collateral Security.—An assignment of a contract, debt, or chose in action is good, although made as collateral security for and not payment of a pre-existing debt, p. 340.

See 149 Iowa 120, citing the text, not yet published.

Cross reference. See, in this connection, annotations under Rule 3 of Trustees of Iowa College v. Hill (12 Iowa 462), Vol. II, p. 75.

3. Garnishment—Garnishee not Chargeable with Interest after Garnishment—When May be so Charged.—Unless a garnishee uses the fund garnished after the garnishment, he is not chargeable with interest from that time until the determination of the cause. Unless the contrary appears, it will be presumed that the garnishee kept the fund garnished separate from his other funds to answer the judgment of the court: But if the garnishee appears as a litigant it will overcome this presumption, p. 340.

Unreported citation, 128 N. W. 9.

SIMMS v. MCKEE & STIMSON, 25 IOWA 341

1. Chattel Mortgage Executed and Recorded in Another State—Enforcement in This State—Lex Loci Contractus.—A mortgage of personal property executed and recorded in another state in accordance with the laws thereof (the property when mortgaged being within such state) has the same force and effect to bind the property when it is removed to this state, and will be enforced here as under the laws of the state where it was executed, p. 342.

Distinguished and narrowed in Aultman & Taylor Machinery Co. v. Kennedy, 114 Iowa 446, 89 Am. St. Rep. 373, 87 N. W. 436, holding that a chattel mortgage executed and recorded in another state on property some of which is in this state at the time thereof, does not operate as constructive notice to purchasers, or attaching creditors, of that part of the property which was situated in this state at the time of such execution and recording.

(Note.—See also, Smith & Co. v. McLean, 24 Iowa 322, sustaining the text.—Ed:)

GARDNER v. BAKER, GUARDIAN, 25 IOWA 343

1. Fraudulent and Voluntary Conveyances—Rights of Existing and Subsequent Creditors.—A *voluntary* conveyance of land made by a debtor with the fraudulent intent to hinder or delay creditors, which intent is participated in by the grantee, is fraudulent as to all creditors of the grantor (debtor), whether existing or subsequent, and will be set aside in equity upon complaint of any of them, pp. 345-347.

Reaffirmed and extended in Bonnell v. Allerton, 51 Iowa 176, holding further that a deed made intentionally to defraud existing creditors is fraudulent as to subsequent ones.

Reaffirmed and extended in Brundage v. Cheneworth, 101 Iowa 262, 263, 63 Am. St. Rep. 382, 70 N. W. 211-213, holding further that where a conveyance is merely voluntary and the grantor had no fraudulent intent, it cannot be set aside by a subsequent creditor: That a conveyance actually and intentionally fraudulent as to existing creditors, as a general rule, is not fraudulent as to subsequent creditors, but that this rule admits of exceptions; such as when the conveyance is made by the grantor with the express intent and view of defrauding those who may thereafter become creditors, or cases wherein the grantor makes the conveyance with the express intent of thereafter becoming indebted, or cases of voluntary conveyances where the grantor pays existing creditors by contracting other indebtedness in a like amount, when the subsequent creditors are subrogated to the rights of the creditors whose debts their money has paid, or cases in which one makes a conveyance to avoid the risks or the losses likely to result from new business ventures: And that if a conveyance is ac-

tually fraudulent as to existing creditors and is merely colorable and the property is held in secret for the grantor, who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors.

Cited in King v. Tharp, 26 Iowa 287, a case wherein a deed to land was set aside as constructively fraudulent as to certain *existing* creditors.

Cross reference. See further on this question, annotations and cross references under Hook v. Moore (17 Iowa 195), Vol. II, p. 516.

2. Partnership—Compromise and Release by Creditor of One Partner—Effect.—Where a creditor of a partnership compromises with and releases one member of the firm from liability on his debt, and by an agreement based upon a valuable consideration, and the agreement shows that it is not the intention to release other partners, the compromise and release has no effect upon the liability of the latter, pp. 348, 349.

Reaffirmed in Gegner v. Warfield, Howell & Co., 72 Iowa 13, 2 Am. St. Rep. 226, 33 N. W. 240.

Cross reference. See further on this question, annotations under Seymour & Co. v. Butler (8 Iowa 304), Vol. I, p. 513.

ROBERTSON v. ROBERTSON, 25 IOWA 350

1. Husband and Wife—Agreement of Separation—Relinquishment of Dower.—A husband and wife may, in good faith and in the absence of fraud, enter into an agreement of separation, whereby the wife in consideration of a certain property or sum of money relinquishes her right to dower in the husband's real property, pp. 351, 352.

Cited in Pool v. Burnham, 105 Iowa 622, 75 N. W. 475, the court holding that under Sec. 2203 of the Code of 1873, neither a husband nor a wife may contract with the other, whereby either releases or relinquishes his or her right to a distributive share in the *personal estate* of the other upon the death of the consort.

Cited in Baird v. Connell, 121 Iowa 284, 96 N. W. 865, the court holding that under Sec. 3154 of the Code of 1897, when property is owned by husband or wife, the other has no interest therein which can be the subject of contract between them, yet this section only relates to the interest the husband or wife has in the lands [this case involved a land transaction only] of the other which arises out of or is created by the marriage relation, and does not apply to any interest the husband or wife may have in the land of the other derived from or based upon any other source; That under Sec. 3157 of the Code of 1897, a conveyance by a husband or wife to the other consort in any other case than as above is valid, the same as if between other persons: Holding, also, that an agreement between husband and wife

for future separation is against public policy and void, except in so far as it provides for maintenance or other collateral engagements.

Cited in Fowler v. Chadima, 134 Iowa 214, 120 Am. St. Rep. 433, 13 Am. & Eng. Ann. Cas. 141, 111 N. W. 810, the court holding that a wife may relinquish her dower interest in land conveyed by her husband, by a separate quit-claim deed executed by her subsequent to the deed executed by her husband.

Cited in Richmond v. Tibbles and Husband, 26 Iowa 477, not in point.

Overruled in Linton v. Crosby, 54 Iowa 479-481, 6 N. W. 727, holding that under Sec. 2203 of the Code of 1873, an agreement of separation between husband and wife, whereby they mutually agree to release the dower or other property rights each has in the other's property, is void *ab initio*: That the above section was intended to and does abrogate the rule of the text.

Cross reference. See further on this question, annotations under McKee v. Reynolds (26 Iowa 578) *Infra*. p. 366.

MOORE v. PARKER, 25 IOWA 355

1. Fraud—Burden of Proof—Fraud will not be Presumed.—

The burden of proof is on a party alleging and claiming relief on the ground of fraud, when it is denied, to prove it by sufficient evidence. Fraud will never be presumed in such a case, p. 363.

Reaffirmed in First Nat'l Bank of Cedar Rapids v. Hurford & Bro., 29 Iowa 586.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 1 of Oaks v. Harrison (24 Iowa 179), *ante*. 163.

HARDIN v. BRANNER, 25 IOWA 364

1. Practice—Trial—General and Special Verdicts—When General Is to be Disregarded and Judgment to be Entered on Special.—

To entitle a party to a judgment upon a special verdict against a general verdict in favor of the other party, the special findings must be inconsistent with the general one; and such special findings must, of themselves, or when taken together with the facts admitted by the pleadings, be sufficient to establish or defeat (as the case may be) the right to recover, p. 368.

Reaffirmed in Conners, Adm'r, v. B. C. R. & N. Ry. Co., 71 Iowa 492, 60 Am. Rep. 814, 32 N. W. 466; Shulte v. Ch., M. & St. P. Ry. Co., 114 Iowa 93, 86 N. W. 64.

Reaffirmed in part in Mershon v. Nat'l Ins. Co., 34 Iowa 90, holding that to justify a judgment upon a special verdict, contrary to the general verdict, it must affirmatively appear that the latter is inconsistent with the former.

Reaffirmed and explained in part in Cooper v. McKee, 53 Iowa 242, 5 N. W. 124, holding that when under a special verdict the plaintiff has no cause of action, a general verdict in his favor will—under the Code of 1873—be disregarded, and judgment be entered for defendant upon the special verdict.

Reaffirmed and explained in part in Krauskopf v. Krauskopf, 82 Iowa 539, 48 N. W. 932, holding that where under the charge given to the jury a special finding shows clearly that the general verdict should have been for a certain sum in favor of either party, and the general verdict is for the other party, the general will be disregarded and judgment will be rendered in favor of the party and for the amount authorized by the special finding.

Reaffirmed and explained in part in Johnson v. Miller, 82 Iowa 699, 31 Am. St. Rep. 514, 47 N. W. 903, holding that it is only when the special findings of facts are manifestly inconsistent with the general verdict that the special findings should control.

Reaffirmed and explained in part in Hawley, Adm'r, v. City of Atlantic, 92 Iowa 174, 175, 60 N. W. 520, holding that in order to warrant a judgment upon special findings against a general verdict, the former must be absolutely and necessarily inconsistent with the latter.

Reaffirmed and extended in Kerr, Adm'r, v. Keokuk Water-works Co., 95 Iowa 513, 64 N. W. 597, holding further that if the general verdict is inconsistent with the instructions to the jury and the special findings, a motion to set aside the general verdict and for judgment on the special findings should be sustained.

Cited in Helphrey v. Ch. & R. I. R. Co., 29 Iowa 483, the case turning upon the sufficiency of a verdict upon which the court may enter judgment.

(Note.—The decision of the text is under the Code of 1860, and the cases hereunder are under the various codes of 1860, 1873, and 1897. There are many other cases sustaining, but not citing, the text.—Ed.)

Cross references. See Rule 2 hereof, in this connection. See further on this question, annotations under Rule 3 of Bonham v. Iowa Central Ins. Co. (25 Iowa 328), ante. p. 271; Lamb v. First Presbyterian Society of Marshalltown (20 Iowa 127), Vol. II, p. 789.

2. Practice—Trial—Special Finding, Failure of Jury to Agree—Effect.—Where the jury fail to agree on an answer to a question submitted to them for a special finding, and part of them return an answer thereto in the affirmative and part in the negative, the answer returned is the same as no answer, and will have no bearing on the case, and will not be considered by the court, p. 369.

Reaffirmed and qualified in Sutherland v. Standard Life & Accident Ins. Co., 87 Iowa 513, 54 N. W. 456, holding that the failure of the jury to return a special finding will not necessitate a reversal,

unless because of the failure, it is manifest from the record that the jury has not found the necessary facts to authorize its general verdict.

3. Payment—Giving of Note in Payment of Pre-existing Debt.

—The giving of a note by a debtor in payment of an existing debt [in this case a mortgage] operates as a *payment* of the debt, if it is accepted as such by the person entitled to receive payment, p. 370.

Reaffirmed in Iowa County v. Foster, 49 Iowa 679, 680.

Cited in Sioux City v. Weare, 59 Iowa 99, 12 N. W. 788, not in point, but upon analogy.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

MONTY v. ARNESON, 25 IOWA 383

1. Intoxicating Liquors Kept in Violation of Law is Property

—**Replevin for Against Officer or Other Person.**—Although intoxicating liquor is kept in violation of law it is nevertheless property; and the owner may maintain replevin therefor against a sheriff, or other person, wrongfully obtaining its possession, pp. 385-388.

Reaffirmed and qualified in Fries & Co. v. Porch, 49 Iowa 356, 357, holding that where one who claims to be the owner of intoxicating liquors brings replevin against an officer (a marshal of a city) for the possession thereof, and alleging that they were lawfully within the State, and the defendant justifies under a writ or process under which he seized and holds them, it is the duty of the court to try the issue and decide whether the liquors are properly in the custody of the law. And the defendant, in such case, cannot agree to a judgment in favor of the plaintiff.

Distinguished in Pearson, et al, v. International Distillery, et al, 72 Iowa 355, 34 N. W. 5, the court holding that injunction lies to declare a distillery a nuisance, and to enjoin the manufacture, sale and keeping for sale therein, of all intoxicating liquors.

Cross reference. See further in this connection, annotations under State v. May (20 Iowa 305), Vol. II, p. 821.

BRANNER v. PIPER, 25 IOWA 400

1. Contracts—Accord and Satisfaction—Tender of Satisfaction

by One Party Which Is Refused by Other—Rights of Party Making Tender—Damages.—Although it may be that a tender of satisfaction by one party to a contract and which is not accepted, does not amount to an accord and satisfaction, a point on which the authorities disagree and which is not decided herein, yet if one of the parties to a contract tenders performance and satisfaction of the conditions he is to perform and according to the terms of the contract, and the other party refuses to accept and fails to comply with the terms thereof; then the party so tendering may when sued by the other on the con-

tract, set up such fact by way of set-off, cross-demand, or counter-claim, according to the circumstances, and recover any damages resulting in consequence of the plaintiff's breach, p. 402.

Special Cross reference. For cases citing the text, and many others on the question, see annotations under *Hall v. Smith* (15 Iowa 584), Vol. II, p. 385; and see, also, cross references there found.

CHURCH v. SIMPSON, 25 IOWA 408

1. Garnishment—When Garnishee Liable—Liability on Answer, When.—In order to entitle the plaintiff in a garnishment action to judgment against the garnishee, the latter's indebtedness to the defendant (debtor) must appear affirmatively; and in order to render the garnishee liable on his answer *alone*, he must therein clearly admit the indebtedness: And if, in such case, there be a reasonable doubt of the indebtedness, judgment must not be rendered against him, p. 410.

Reaffirmed in *Bolton v. Bailey*, 122 Iowa 730, 98 N. W. 560, under the Code of 1897.

Cross reference. See further on this question, annotations and cross references under *Morse v. Marshall* (22 Iowa 290), ante. p. 34.

2. Intoxicating Liquors—Sale of in Violation of Law—Recovery of Purchase Money Paid.—Where intoxicating liquors are sold in violation of law and the purchase money is paid, the purchaser may recover the sum paid from the seller: But in an action based on such cause of action, the fact that the liquors were sold in violation of law must affirmatively appear, p. 411.

Cited in *Monty v. Arneson*, 25 Iowa 394, (dissenting opinion), the majority court opinion not in point.

OWEN v. PERRY, 25 IOWA 412, 96 AM. DEC. 49

1. Principal and Agent—Deed or Mortgage Executed by Principal with Name of Grantee and Consideration Blank—Implied Authority to Agent to Fill in—Rights of Bona Fide Purchasers and Third Persons.—Where a deed, or mortgage, to or on land is executed by a principal with the name of the grantee and the amount of the consideration blank, and it is afterwards filled as to amount of consideration, terms, and the name of the grantee, by an agent under a written authority to make sale of the property and deliver the deed to the purchaser, it is valid as against innocent purchasers and third persons without notice, pp. 423-426.

Reaffirmed, explained and extended in *Clark v. Allen*, 34 Iowa 192, holding that although a deed executed with the name of the grantee blank does not divest the grantor of the legal title, and that the subsequent insertion of the name of a grantee without the consent or ratification of the grantor does not have this effect, still, where such grantee pays the purchase price under such a deed, it gives him

the equitable title to the land; and he has the right to enforce a conveyance by such grantor of the legal title thereto to him: And that this equity is subject to contract and sale by the grantee, or to sale under execution against him.

Reaffirmed, explained and extended in Swartz v. Ballou, 47 Iowa 193, 194, 29 Am. Rep. 470, holding further that where a deed is executed with the name of the grantee blank, and is delivered to an agent with an express or implied authority to fill in the blank and perfect the conveyance, it is valid—And such authority to such agent may be given by parol: Holding further that this rule is most strongly to be invoked in favor of an innocent purchaser for value.

Reaffirmed and extended in McCleary v. Wakefield, 76 Iowa 533, 2 L. R. A. 529, 41 N. W. 211, holding that when a deed is delivered to an agent with express authority to fill in the name of the purchaser as grantee, it is good in favor of an innocent purchaser, for value, whose name is so inserted therein.

Reaffirmed and extended in Creveling v. Banta, 138 Iowa 55, 115 N. W. 601, holding further that the delivery of a deed or mortgage to land, carries with it the authority to insert or cause to be inserted, the name of the grantee and the consideration, if they are left blank therein; and that as to innocent purchasers, such an instrument passes the legal title to the grantee whose name is so inserted.

Reaffirmed and varied in State v. Tripp, 113 Iowa 704, 84 N. W. 548, holding that a deed may be executed with the name of the grantee blank, and placed in the hands of another under such circumstances as to create an implied authority in the latter to insert the name of the grantee—The case involving the crime of obtaining the signature to such a warranty deed by false pretenses.

(Note.—See further, McClain v. McClain, 52 Iowa 272, 3 N. W. 60; Devin v. Hiner, 29 Iowa 297, sustaining and intimately connected with, but not citing, the text.—Ed.)

ROBINSON v. PHOENIX INS. CO., 25 IOWA 430

1. Written Contracts and Instruments—Immaterial Alteration of—What Is—Effect—Intent.—An immaterial alteration of a written contract or other instrument, that is one that does not give it a different legal effect, does not affect the validity of the contract or instrument.

If such an alteration is immaterial as above, the fact that it was made *with intent* to change the legal effect of the contract or instrument, will not be considered, p. 435.

Reaffirmed in Sawyers, Adm'x, v. Campbell, 107 Iowa 400, 401, 78 N. W. 56.

Reaffirmed as to first paragraph in Briscoe v. Reynolds, 51 Iowa 675, 2 N. W. 531; Iowa Valley State Bank v. Sigstad, 96 Iowa 494,

65 N. W. 408; *James & Haverstock v. Dalbey*, 107 Iowa 469, 78 N. W. 57.

Reaffirmed and extended in *Rowley v. Jewett*, 56 Iowa 495, 9 N. W. 354, holding further that the rule is equally applicable to an interlineation in a written contract or other instrument.

WILLIAMS v. PEINNY, 25 IOWA 436

1. **Injunction—Illegal School Tax—Who May Enjoin.**—Injunction lies upon the complaint of a tax payer and resident of a township to restrain the collection of a school tax levied without authority of law, p. 438.

Special Cross reference. For cases citing, sustaining and explaining the text, and many others on the question, see annotations under Rule 1 of *Macklott v. City of Davenport* (17 Iowa 379), Vol. II, p. 541.

2. **Schools—Contracts for Repairs of School-house—How Paid—Powers of Directors of District Township.**—The board of directors of a district may—under Chap. 172, Laws of 1862—make a contract for “repairs” of a school-house to be paid out of the “contingent fund” and without a vote of the electors granting authority therefor; but such board cannot without such vote of the electors, under the name of “repairs” make a contract involving the *rebuilding* or making an *addition* to a school-house, when the work is in no just sense a repair, and then charge the cost thereof to the contingent fund. In all such cases the question of whether or not the contract made by the board is for “repairs” is one of fact, pp. 438, 439.

Cited in *Manning v. Dist. Township of Van Buren*, 28 Iowa 334, 36, holding that the board of directors of a district township has no authority to make a contract for the purchase of school apparatus, except when authorized so to do, as provided by Sec. 7, of Chap. 172, Laws of 1862, by a vote of the electors; and that a contract made therefor by such board without such authority is void; and that an order drawn in payment therefor is void, even in the hands of an innocent holder: And that the fact of the acceptance and use of the apparatus in the schools is not a ratification of such void contract, and does not raise an implied contract on which recovery on *quantum meruit* may be had.

Cross reference. See further in this connection, annotations under *Taylor v. Dist. Township of Wayne* (25 Iowa 447), next below.

TAYLOR v. DISTRICT TOWNSHIP OF WAYNE, 25 IOWA 447

1. **Schools—Purchase of Maps, Charts and Other School Apparatus—Powers of Board of Directors of District Township—Ratification of Unauthorized Contract, What is Not.**—The board of directors of a district township has no authority to make a contract

for the purchase of maps, charts or other school apparatus, except when authorized so to do, as provided by Sec. 7, of Chap. 172, Laws of 1862, by a vote of the electors, and a contract made therefor by such board without such authority is void: And an order drawn in payment therefor is void, even in the hands of an innocent holder. The fact of the acceptance and use of the maps, charts or other school apparatus in the schools is not a ratification of such void contract, and does not raise an implied contract on which recovery on *quantum meruit* may be had, pp. 449-451.

Reaffirmed in Taylor v. Dist. Township of Otter Creek, 26 Iowa 282, 283; Manning v. Dist. Township of Van Buren, 28 Iowa 334-336.

Reaffirmed and extended in Boardman v. Hayne, 29 Iowa 342, 343, holding further that the officers of a school district are not personally liable on a warrant drawn without authority and to pay for school apparatus purchased without voted authority of the electors of the district as set out in the text.

Reaffirmed and varied in Reichard v. Warren County, 31 Iowa 392, 393, holding that persons dealing with municipal officers or other public agents acting under delegated powers must, at their peril, ascertain for themselves whether in fact and in law, the authority being exercised exists—The case involving the powers of the county board of supervisors to bind the county in the erection of a public building.

Cited in Field v. City of Des Moines, 39 Iowa 579, 18 Am. Rep. 46, the court holding that where a city passes an ordinance in excess of authority conferred, authorizing an officer to do an act or acts, the ordinance is void, and the city is not liable for the act or acts of the officer done thereunder.

Cited in Young v. Blackhawk County, 66 Iowa 465, 23 N. W. 925, not in point.

Distinguished and narrowed in Johnson v. School Corporation of Cedar, 117 Iowa 326, 327, 90 N. W. 716, holding that, either at law or in equity, the fact that a contract is contrary to public policy or otherwise illegal, does not relieve a corporation (municipal or private), from liability thereunder, when it accepts and retains its benefits.

Cross references. See further on this question, annotations under Shepherd v. Dist. Township of Richland (22 Iowa 595), ante. p. 73; Clark v. City of Des Moines (19 Iowa 199); Clark, Dodge & Co. v. City of Davenport (14 Iowa 494); Hull & Argalls v. Marshall County et al, (12 Iowa 142), Vol. II, pp. 715, 272 and 29, respectively; and see, also, specially in this connection, annotations under Rule 3 of Dubuque Female College v. Dist. Township of Dubuque (13 Iowa 555), Vol. II, p. 186.

MINGUS *v.* McLEOD, 25 IOWA 452

1. Attachment—Grounds for—Disposing of or Removing Property from State as Ground—Sufficiency of Allegations of Petition—Substantial Compliance with Statute.—A petition for an attachment must substantially comply with the statute in stating the grounds therefor.

So a petition for an attachment which avers that "defendant is in some manner about to dispose of his property without leaving sufficient remaining for the payment of his debts," is insufficient—under Sec. 3174 of the Code of 1860—in that it fails to aver that the disposition was about to be made *out of the State*, or the property was about to be *removed out of the State*, pp. 452-456.

Reaffirmed as to second paragraph in Bundy v. McKee, 29 Iowa 254.

Reaffirmed and explained in Upp v. Neuhring, 127 Iowa 715, 716, 104 N. W. 351, holding that—under the Code of 1897—a statement in a petition for an attachment that "the defendant (debtor) is about to leave the State and defraud his creditors" is insufficient; that such an allegation cannot be construed to be an allegation that he was about to remove his property out of the State, without leaving sufficient remaining for the payment of his debts.

Distinguished as to second paragraph in Warder, Mitchell & Co. v. Thrilkeld, 52 Iowa 136, 2 N. W. 1075, holding that—under Sec. 2951 of the Code of 1873, corresponding to the section of the text—temporary removal of his property by a debtor *out of the State*, is not ground for an attachment; that in order to authorize an attachment the debtor must be about to *permanently* remove his property out of the State, without leaving sufficient, etc.

WALLACE *v.* BERGER, 25 IOWA 456

(Former Appeal, 14 Iowa 183.)

1. Fraud—Burden of Proof—Fraud Will Not be Presumed.—The burden of proof is on a party alleging and claiming relief on the ground of fraud, when it is denied, to prove it by sufficient evidence. Fraud will never be presumed in such a case, pp. 460, 461.

Special cross reference. For cases citing the text, see annotations under *Moore v. Parker* (25 Iowa 355), ante. p. 278.

2. Judicial and Execution Sales of Land—Gross Inadequacy of Purchase Price as Ground for Setting Aside Sale.—Whether gross inadequacy of the purchase price of land sold at a judicial or execution sale is, of itself, sufficient to constitute a ground for setting it aside in equity, in the absence of fraud, and where the sale is shown to have been fair and honest, is not herein decided; as in this case the purchase price is not so grossly inadequate as to call for a decision of the question, pp. 461, 462.

Cited in Peterson v. Little, 74 Iowa 227, 37 N. W. 171; Lehner v. Loomis, 83 Iowa 420, 49 N. W. 1019, holding that gross inadequacy of the purchase price of land sold under a judicial or execution sale, is not *alone* sufficient to set it aside; and that in such case the period of redemption fixed by statute is ample protection for the debtor.

Cited in Wood, Bacon & Co. v. Young, 38 Iowa 108, where the court, for the same reason as in the text, declined to decide the question.

(Note.—See further specially, Sigerson v. Sigerson, 71 Iowa 476, 32 N. W. 462; Swortzel, Exr. v. Martin, 16 Iowa 522; Singleton v. Scott, 11 Iowa 589, some important cases on and in connection herewith, not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 3 of Cavender v. Heirs of Smith (1 Iowa 306), Vol. I, p. 185.

3. Tax Sale of Lands En Masse, Void—When Will Not be so Decreed—Pleadings—Relief.—In an action in equity to set aside a tax sale of several parcels or tracts of land, where the petition does not set out that the sale is void because the several parcels or tracts were sold together for a gross sum, and asks no relief on that ground, the sale will not be set aside for that reason, p. 463.

Reaffirmed in Farmers' Loan & Trust Co. v. Wall and Milchrist, 129 Iowa 654, 106 N. W. 161.

Special cross reference. For further cases citing the text, and many others on the question, see annotations under Boardman v. Bourne (20 Iowa 134), Vol. II, p. 791.

Cross reference. See further in this connection, annotations under Corbin v. De Wolf (25 Iowa 124), ante. p. 244.

ALLEN v. McCALLA, 25 IOWA 464, 96 AM. DEC. 56

1. Chattel Mortgage—Retention of Possession of Property—Validity as Against Creditors of Mortgagor.—A mortgage of personal property where the mortgagor retains possession of the property is—under Sec. 2201 of the Code of 1860—valid as to existing creditors of the mortgagor, with either actual or constructive notice thereof, pp. 478, 479, 482.

Reaffirmed and explained in Tiffany v. Anderson, 55 Iowa 407, 7 N. W. 648, holding that neither the delivery of personal property sold, or the recording of a bill of sale therefor, is necessary to transfer the title to the purchaser as against an existing creditor of the seller who had notice of the sale or transfer.

Reaffirmed, explained and qualified in Murphy v. Murphy & Co., 126 Iowa 64, 101 N. W. 488, holding that—under Sec. 2906 of the Code of 1897—an unrecorded chattel mortgage is valid save as against subsequent purchasers and existing creditors, without notice; but that

a creditor, existing as such at the time of the execution of the mortgage, must obtain a lien, as by attachment or otherwise, upon the mortgaged property before notice, actual or constructive, of the mortgage, in order that he may avail himself of the benefit of the statute: And a creditor who becomes such after the execution of a mortgage and before notice thereof, may be heard to assail such mortgage on the ground of fraud in that he was induced to extend a credit that would not otherwise have been given.

Cited with approval in Aultman & Taylor Machine Co. v. Kennedy, 114 Iowa 447, 89 Am. St. Rep. 373, 87 N. W. 436, involving a similar statute of a foreign state.

Cited in Blackman, Adm'r, v. Baxter, Reed & Co., 125 Iowa 128, (dissenting opinion), 70 L. R. A. 250, 2 Am. & Eng. Ann. Cas. 707, 100 N. W. 78, the majority court holding that the personal property of a decedent and the heir's interest therein is burdened by the claims of creditors, and until these have been discharged he is neither entitled to distribution nor to exercise any control over the property: Holding therefore that an administrator of a decedent whose estate is insolvent may attack the validity of a chattel mortgage executed by the decedent before his death and while insolvent, which mortgage is unrecorded and void under Sec. 2906 of the Code of 1897, as to existing creditors; the action of the administrator in such case being as trustee and for the benefit of decedent's creditors.

Distinguished and narrowed in Bacon & Co. v. Thompson, 60 Iowa 285-287, 14 N. W. 313, holding that where personal property included in a prior, unrecorded bill of sale is levied on by the sheriff under an attachment of a creditor of the vendor, neither the sheriff nor the attaching creditor knowing of the sale at the time of levy and the property being in the possession of the vendor (debtor) then the attachment is prior to the claim of the vendees in the bill of sale.

Cross references. See further on this question, annotations under Hughes v. Cory, Adm'r, (20 Iowa 399), Vol. II, p. 832; Rule 3 of Allison v. Barrett, (16 Iowa 278), Vol. II, p. 435; Rule 3 of Wilhelmi v. Leonard (13 Iowa 330), Vol. II, p. 157; Torbert v. Hayden, sheriff, (11 Iowa 435), Vol. I, p. 839; McGavran v. Haupt (9 Iowa 83), Vol. I, p. 547, and cross references found at these cases.

2. Notice—What Constitutes Constructive Notice.—If a subsequent purchaser, mortgagee, or a creditor of a mortgagor, or seller, has knowledge of such facts as would put a reasonable man upon inquiry, which inquiry would certainly lead to a knowledge of the rights of a prior purchaser, or mortgagee to or on the property, whether real or personal, he is charged with notice of the existence of the prior sale or mortgage, pp. 481, 482.

Reaffirmed in Aultman & Taylor Machine Co. v. Kennedy, 114 Iowa 451, 89 Am. St. Rep. 373, 87 N. W. 438; Frick v. Fritz, 115 Iowa 444, 91 Am. St. Rep. 165, 88 N. W. 963.

Reaffirmed in Goll & Frank Co. v. Miller, 87 Iowa 433, 54 N. W. 446, a case wherein the facts did not bring the case within the rule.

Reaffirmed and extended in Ross v. C. R. I. & P. R. R. Co., 55 Iowa 694-696, 8 N. W. 646, holding further that the rule is applicable to notice to a client by knowledge of his attorney such as would put upon inquiry as in the text.

Reaffirmed and qualified in Weare & Allison v. Williams, 85 Iowa 261, 52 N. W. 331, holding that in order to charge a subsequent *bona fide* purchaser, or mortgagee, with notice of a prior unrecorded conveyance by reason of knowledge of facts such as would put a reasonably prudent man upon inquiry, the proof thereof must be clear and decisive.

Unreported citation, 75 N. W. 503.

Cross references. See Rule 3 hereof. See further on this question, annotations under English v. Waples (13 Iowa 57), Vol. II, p. 118. See also, in this connection, annotations under Rule 4 of Smith & Co. v. McLean (24 Iowa 322), ante. p. 187.

3. Notice—Attorney and Client—Notice to Attorney is Notice to Client.—Notice to an attorney, or such facts as constitute notice, given to or acquired by an attorney in the course of his employment, is notice to his client, p. 486.

Reaffirmed and explained in Walker v. Schreiber, 47 Iowa 532, 533, holding that notice to or knowledge acquired by an attorney during the course of his employment of the assignment of mortgage notes, is notice thereof to his client.

Reaffirmed and extended in Ross v. C. R. I. & P. R. R. Co., 55 Iowa 694-696, 8 N. W. 646, holding further that knowledge of facts such as will put upon inquiry as set out in Rule 2 hereof, acquired by an attorney during the course of his employment, operates as notice to the client as therein set out.

Special cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 1 of Jones v. Bamford (21 Iowa 217), Vol. II, p. 894.

4. Chattel Mortgage—Mortgage on After-Acquired Goods—Validity.—The question of whether or not a mortgage on goods to be afterwards acquired is good as against a subsequent attachment creditor of the mortgagor, where the mortgagee has not reduced them to actual possession before the levy of the writ, is not decided, pp. 486, 487.

Special cross reference. For cases citing the text, and many others on the question, see annotations under Rule 2 of Dunham v. Isett (15 Iowa 284), Vol. II, p. 344.

5. Attachment—Levy of on Personal Property—What Sufficient—Rights of Third Persons.—To constitute a valid levy of an attachment on personal property [under Sec. 3194 of the Code of 1860] the officer must do such acts as that, but for the protection of the writ, he would be liable in trespass: Anything short of this will not constitute a levy or confer the right of property or possession upon the officer; and certainly not as against a third party, p. 487.

Reaffirmed and extended in Rix & Stafford v. Silknitter, 57 Iowa 265, 10 N. W. 654, holding further that the levy must be so made that it identifies or gives the means of identifying what is levied on, so that any property levied on may be made chargeable to the officer, and property not levied on cannot be subsequently claimed: That it must be seized manually or by assertion of control so that it may be made effectual if necessary, thus to bring and keep it within the dominion of the law for sale on execution, if needed and for no other purpose.

Unreported citation, 124 N. W. 625.

Cross reference. See further sustaining, etc., but not citing, the text, annotations under Crawford v. Newell (23 Iowa 453), ante. p. 122.

BOARDMAN & BROWN v. THOMPSON, 25 IOWA 487

1. Contracts—Champerty and Maintenance—Attorney and Client—Champertous Contract Between, Void—Public Policy.—Champertous contracts are void under the Common Law, and in this State as against public policy.

So a contract between an attorney and his client whereby the former is to institute an action, to advance money for court costs, etc., and to receive payment therefor out of the amount recovered, together with a certain per cent. of the recovery for his services, all to be paid out of the amount recovered, the action not to be settled without the attorney's consent, is champertous and void as against public policy, pp. 498-501, 504, 505.

Reaffirmed and explained in Adye v. Hanna, 47 Iowa 266-268, 29 Am. Rep. 484, holding that where an attorney who is employed to defend an action executes a bond to his client, in consideration of the compensation for the legal services, to save him (the client) harmless of any judgment that may be entered against him, the bond is void as against public policy.

Reaffirmed and explained in Donaldson & Eaton v. Estes. 136 Iowa 653-655, 14 L. R. A. (New Series), 1168, 114 N. W. 21, holding that a contract between an attorney and client, whereby the former in consideration of a lump sum, agrees to procure the client a divorce from his wife and the settlement of her alimony, the sum agreed on to be in full for and to include all costs of suit, attorney's fees, and all other expenses whatever of the divorce proceeding, is champertous and void.

Reaffirmed and extended in Barngrover v. Pettigrew, 128 Iowa 535, 111 Am. St. Rep. 206, 2 L. R. A. (New Series), 260, 104 N. W. 904, holding further that when a contract between an attorney and client is champertous and therefore void as against public policy, the attorney cannot recover on a *quantum meruit* for the value of the services rendered.

Cited with approval in Hyatt v. B. C. R. & N. Ry. Co., 68 Iowa 663, 27 N. W. 815, the case turning on other questions.

Cited in Graham v. Dubuque Specialty Machine Works, 136 Iowa 460, 15 L. R. A. (New Series), 729, 114 N. W. 621, the case turning on other questions, not in point, but intimately connected with the text.

Distinguished in McDonald v. Ch. & N. W. R. R. Co., 29 Iowa 174, holding that a contract between an attorney and his client for the former to receive a contingent fee is valid, where there is no provision for the attorney to pay any of the expenses of the action, and no stipulation preventing the client from settling the controversy.

Distinguished in Allison v. C. & N. W. R. R. Co., 42 Iowa 280, holding that although a contract between an attorney and his client be champertous, such fact cannot be pleaded as a defense, or be taken advantage of, by the other party to the action brought.

Distinguished in Wallace and Brown v. Ch., M. & St. P. Ry. Co., 112 Iowa 568, 84 N. W. 663, holding that when a contract between an attorney and client does not appear to be champertous, the fact that the attorney, during the pendency of the action, advanced certain money to pay expenses incident to the preparation and trial of the case, is not *alone* sufficient to prove that the contract was champertous.

Distinguished in Barthell and Johnson & Son v. Ch. M. & St. P. Ry. Co., 138 Iowa 690, 116 N. W. 814, holding that where a contract between an attorney and client gives the attorney the right to settle the controversy, but does not exclude the same right of the client, it is not, for that reason, champertous and void.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

Cross reference. See Rule 2 hereof, in this connection,

2. Contracts in Violation of Statute, Common Law, or Public Policy, Void.—Contracts in violation of a statute, or of the Common Law, or which are against public policy, are void, pp. 503, 504.

Reaffirmed and explained in Hawkeye Ins. Co. v. Brainard, 72 Iowa 132, 133, 33 N. W. 604, holding that a contract whereby an officer agrees to accept a less or greater compensation than is prescribed by statute, or whereby he agrees not to avail himself of a statutory mode of enforcing the collection of his fees, is contrary to public policy and void.

Reaffirmed and extended in Barngrover v. Pettigrew, 128 Iowa 535, 111 Am. St. Rep. 206, 2 L. R. A. (New Series), 260, 104 N. W. 904, holding further that where plaintiff sues for a claim based upon a contract contrary to statute or to public policy, the contract being void, he cannot recover thereon on a *quantum meruit*.

Reaffirmed and qualified in Muscatine County v. Carpenter, 33 Iowa 43, 44, holding that although money of a county which has been regularly appropriated, be illegally paid by the board of supervisors, clerk and treasurer thereof, such fact is no defense to an action on the bond of the person to whom it is paid.

Distinguished in Griswold v. Ill. Cent. Ry. Co., 90 Iowa 270, 24 L. R. A. 647, 57 N. W. 845, holding that where a person leases part of a railroad's depot grounds for the purpose of erecting and maintaining an elevator thereon, and it is stipulated in the lease that the lessee will "save the lessor (railroad company), harmless from all liability for damages by fire, which, in the operation of the lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises," such provision and stipulation is valid, and is not against public policy.

Cross references. See Rule 1 hereof. See further on this question, annotations, note and cross references under Reynolds v. Nichols & Co. (12 Iowa 398), Vol. II, p. 67.

BARTHOLOMEW v. MERCHANTS' INSURANCE CO., 25 IOWA 507, 96 AM.

DEC. 65

1. Fire Insurance Companies—Application for Policy—Misrepresentations by Insured—Acts of Agent—Estoppel.—If insured at the time of making an application for fire insurance knew of the provision in the application which stated "that the foregoing is a correct description of the property to be insured, and on which the insurance would be predicated, and a warranty on his part," and knew or had reason to know that the local agent of insurer had simply power to take and forward applications, and knew that the application which he signed was to be forwarded to the company and would be submitted to it as the sole basis on which it or its directors would act in accepting or rejecting the risk, in such case he must see that the statements and representations in the application are not essentially untrue. But if, on the other hand, the agent of the company furnished and undertook to fill up the application, and if in so doing he was correctly informed respecting an incumbrance, and if the insured was misled by the acts and conduct of the agent into supposing that the agent had taken down his answers truly, and that the application was correct, and if through the fault of the agent he (the insured) did not know the contrary, then the company, having received the premium,

cannot successfully set up the existence of the incumbrance as a defense to an action on the policy, pp. 514, 515.

Reaffirmed in part and varied in Williams v. Niagara Fire Ins. Co., 50 Iowa 568, the court holding that where an agent of a fire insurance company has power to countersign and issue policies, accept risks offered him and receive premiums therefor, and insures a house knowing it is unoccupied, the company is bound by his act, and the policy is valid.

Reaffirmed and explained in part in Hingston v. Aetna Ins. Co., 42 Iowa 47, holding that if an applicant for insurance truly answers the questions asked, and the agent for the insurance company does not take down the answers, but deceives and misleads, although not designedly, the applicant into the belief that his application is all right, and the application is signed by reason of such conduct of the agent, the company is liable under a policy issued thereon.

Cited in Donnelly v. Cedar Rapids Ins. Co., 70 Iowa 695, 28 N. W. 608, the court holding that when a local agent of a fire insurance company fills in the statements in an application for insurance, from his own knowledge or that derived from others than the insured, and the insurer issues the policy thereon and accepts the premium, it is liable for the acts of its agent, and the policy is valid as against it.

Cross reference. See further on this question, annotations under Rule 3 of Ayres v. Hartford Ins. Co. (17 Iowa 176), Vol. II, p. 513.

FRANKLIN v. TWOGOOD, 25 IOWA 520, 96 AM. DEC. 73

(Former Appeal, 18 Iowa 515; Later Appeal, 27 Iowa 239.)

1. Conflict of Laws—Lex Loci Contractus—Common Law.—Ordinarily the law of the place where a contract is made governs its interpretation and the rights of the contracting parties; but where its enforcement involves the Common Law adopted in both the state where it was made and the state where it is sought to be enforced, or involves the law merchant, the decisions of the state where the contract is being enforced, govern, pp. 523, 524.

Reaffirmed in Nat'l Bank of Michigan v. Green, 33 Iowa 146, 147.

Reaffirmed and explained in Dorr Cattle Co. v. Des Moines Nat'l Bank, 127 Iowa 166, 167, 4 Am. & Eng. Ann. Cas. 519, 102 N. W. 837 holding that every court will determine for itself, the principles of justice as found in the Common Law, and will not be bound by the decisions of a sister state thereon.

STEELE, ADMINISTRATOR v. WARD, 25 IOWA 535

1. Fraudulent Conveyances—Participation in by Both Parties Necessary—Rights of Creditors of Grantor.—In an action in equity

by a creditor of a grantor of land to set aside a deed made with the fraudulent intent to defeat the grantor's creditors, it is not alone sufficient for the plaintiff (creditor) to plead and prove the fraudulent intent of the grantor (debtor), but he must further plead and prove that the grantee participated in, or at least had knowledge of, the fraudulent intent of the grantor at the time of the execution and delivery of the instrument, p. 537.

Reaffirmed in Witham v. Blood, 124 Iowa 703, 100 N. W. 561.

Reaffirmed and explained in Roberts, Butler & Co. v. Press, 97 Iowa 480, 481, 66 N. W. 758, holding that a conveyance, or mortgage by a debtor to one of his creditors which is based upon a consideration, will not be set aside as fraudulent unless the fraud on the part of the grantor was participated in by the grantee, to the extent at least of knowledge by the grantee of the grantor's fraudulent intent, or of facts and circumstances such as in law should put the grantee upon inquiry: Holding, also, that the fact that the grantee, or mortgagee (creditor) when he took his deed or mortgage, knew of the existence of other creditors whose claims were not secured and who would be postponed, or even defeated by the conveyance, does not affect the validity of the instrument, in the absence of a fraudulent intent on his part.

Reaffirmed and explained in Rosenheim & Son v. Flanders, 114 Iowa 293, 86 N. W. 294, holding that a sale made by a debtor with the fraudulent intent to hinder and delay his creditors can be avoided by them in equity as against any purchaser, even though he paid full value, if he bought with notice, either actual or constructive, of the grantor's intent.

Reaffirmed and extended in Kellogg v. Aherin, 48 Iowa 300; Rosenheim & Son v. Flanders, 114 Iowa 293, 86 N. W. 294, holding further that in an action by creditors to set aside a deed of their debtor to land, as fraudulent, the plaintiffs may have relief if they prove knowledge of such facts and circumstances on the part of the grantee as would have put an ordinarily prudent man upon inquiry which would have led to knowledge of the fraudulent intent of the grantor (debtor.)

(Note.—There are numerous other cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Fifield v. Gaston (12 Iowa 218), Vol. II, p. 35.

BANKHEAD v. BROWN, 25 IOWA 540

1. Eminent Domain—Constitutional Law—Taking Property for Private Purposes Without Consent of Owner, Forbidden.—Sec. 18 of the Bill of Rights of our Constitution, declaring that property shall not be taken for public use without just compensation, prohibits, by

implication, the taking of private property for any private use whatever without the consent of the owner, pp. 544, 545.

Reaffirmed in Richards v. Wolf, 82 Iowa 358, 31 Am. St. Rep. 501, 47 N. W. 1044; *Sisson v. Board of Supervisors of Buena Vista County*, 128 Iowa 452, 70 L. R. A. 440, 104 N. W. 458.

Reaffirmed and qualified in Hanson v. Vernon, 27 Iowa 43, 52, 70, 1 Am. Rep. 215, holding, however, that the Legislature may, under peculiar circumstances, condemn private property under the police power, when its use or situation is such as to endanger the public health, welfare or safety; and that private property may be taken by virtue of the taxing power.

2. Eminent Domain—Constitutional Law—Condemnation of Private Property for Public Use—Powers of Legislature and Courts.—*When* the public exigencies demand the exercise of the power of taking private property for public use, is solely a question for the Legislature, upon whose determination the courts cannot sit in judgment. But *what* constitutes such a public use as will justify the exercise of the power of eminent domain, is a question for the courts. And if a public use be declared by the Legislature the courts will hold the use public, unless it manifestly appears by the provisions of the act, that they have no tendency to advance and promote such public use, pp. 545, 546.

Reaffirmed in Hanson v. Vernon, 27 Iowa 50, 1 Am. Rep. 215; *Stewart v. Board of Supervisors of Polk County*, 30 Iowa 50, 1 Am. Rep. 238; *Phillips v. Watson*, 63 Iowa 33, 18 N. W. 662; *Sisson v. Board of Supervisors of Buena Vista County*, 128 Iowa 452-455, 70 L. R. A. 440, 104 N. W. 458, 459.

Reaffirmed in part in Bennett v. City of Marion, 106 Iowa 630, 76 N. W. 845, holding that the necessity for condemning private property for public use is not of judicial cognizance, but lies exclusively within the province of the Legislature: And that the power to condemn may be delegated to municipalities or agencies, and when this is done they have the same powers as the State acting through any regularly constituted authority.

Reaffirmed and explained in Fleming v. Hull, 73 Iowa 601, 605, 35 N. W. 675, 677, holding that the reason of the case, and the settled practice of free governments must be the guides of the courts in determining what is or is not a public use for which private property may be taken.

Reaffirmed and varied in Miller v. Webster City, 94 Iowa 165, 62 N. W. 649, holding that the discretion of a municipal corporation within the sphere of its powers, is as wide as that possessed by the government of the State, subject, however, to the general rule that ordinances must be reasonable: And that the action of the city council in the exercise of expressly delegated powers cannot be questioned upon the ground that it is in conflict with public interests.

Reaffirmed and qualified in Town of Cherokee v. S. C. I. F. Town Lot & L. Co., 52 Iowa 280, 3 N. W. 42, holding, however, that a street is a public purpose for which land may be taken upon rendering compensation, and the court will not review the decision of the city authorities, holding that the public interest requires a street to be established.

Cited with approval in Gray v. B. & M. R. R. Co., 37 Iowa 125, the court holding that where a railway runs between the residence of a citizen, and the only means he has of reaching a highway, that he has a right to insist that an open crossing shall be provided for him, by means whereof he may reach the highway without stopping to open gates or remove bars.

Cited in Strahan v. Town of Malvern, 77 Iowa 458, 459, 42 N. W. 370, the court holding that the passage of an ordinance by a city, establishing an avenue, *prima facie* establishes that it is for a public use; but that this may be overcome by proof sufficient to show the facts otherwise.

Cited in State v. B. C. R. & N. R. R. Co., 99 Iowa 574, 68 N. W. 822, the case turning on the right of a land owner to an adequate railroad crossing.

Cited in Bland v. Hixenbaugh, 39 Iowa 536, not in point.

SHOECRAFT v. BAILEY, 25 IOWA 553

1. **Innkeepers—"Guest" and "Boarder" Defined—Distinction Between—Length of Time of Stay at Inn no Test.**—A "guest" of an Innkeeper comes without any bargain *for time*, remains without one, and may go when he pleases, paying only for the actual entertainment which he receives; while a "boarder" at an Inn is under a contract or bargain for the time he is to stay: And it is not enough to make a "boarder" and not a "guest," that the person has stayed a long time in the Inn, pp. 555.

Reaffirmed and extended in Pollock v. Landis, 36 Iowa 652, holding further that an answer claiming a lien on property as an Innkeeper, which claims the lien because the owner of the property *boarded with* the defendant (Innkeeper), is too indefinite; as the boarding may have been either *as guest* or *as boarder*, and it is only upon the property of the former that the Innkeeper has a lien.

STATE v. BROWN, 25 IOWA 561

1. **Criminal Law—Principal and Accessories Before the Fact—Aiders and Abettors—All are Principals.**—Sec. 4668 of the Code of 1860 abrogates the distinction between an accessory before the fact and a principal, and thereunder all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are punishable as principals, p. 564.

Reaffirmed in State v. Thornton, 26 Iowa 80.

Reaffirmed in State v. Smith, 106 Iowa 703, 77 N. W. 500, under Sec. 4314 of the Code of 1873, corresponding to the section of the text.

Reaffirmed in State v. Denhardt, 129 Iowa 138, 105 N. W. 386, under Sec. 5299 of the Code of 1897, corresponding to the section of the text.

(Note.—There are numerous other cases sustaining, but not citing, the text.—Ed.)

2. Larceny—Possession of Stolen Property Sufficient to Convict, When—Explanation by Accused May be Disbelieved.—Proof of the possession by accused of property soon after it was stolen is sufficient to authorize a conviction for larceny. And where such proof is made by the State, and the attendant circumstances satisfy the jury of the guilt of accused beyond a reasonable doubt, and of the falsity of the explanation of accused, the jury may disbelieve the latter, and return a verdict of guilty, pp. 565, 566.

Reaffirmed in State v. Raphael, 123 Iowa 454, 101 Am. St. Rep. 334, 99 N. W. 152.

STATE v. BRAINARD, 25 IOWA 572

1. Trial—Instructions in Criminal Case—Duty of Court Upon the Trial of a High Criminal Offense.—Upon the trial of a high criminal offense it is the duty of the court to point out to the jury the controverted questions of fact, and to see that the law applicable thereto is given, either in the instructions of counsel or in his own charge, p. 578.

Reaffirmed in State v. Carnagy, 106 Iowa 490, 491, 76 N. W. 807.

Reaffirmed, explained and qualified in State v. Hoot, 120 Iowa 241, 98 Am. St. Rep. 352, 94 N. W. 565, holding that upon the trial of one accused of a crime, the jury must be instructed by the court upon every essential part of the case; but that this does not require the court to give an instruction on a matter in no way involving or constituting the defense.

Cited with approval in State v. Birmingham, 74 Iowa 411, 38 N. W. 123, the case turning upon other questions.

Cited in State v. Hamilton, 32 Iowa 574, a case wherein this point was not decided because of an insufficient record upon the appeal.

Distinguished in Dixon v. Stewart, 33 Iowa 128, holding that when upon the trial of an action at law, the court gives an instruction which is not sufficiently explicit and which does not develop the defense, it is the duty of the defendant to ask an instruction embodying his views of the case.

Distinguished in State v. Kirkpatrick, 63 Iowa 559, 19 N. W. 662, holding that where upon the trial of an indictment, the issue and defense is fully stated to the jury in the court's instructions or charge, the fact that the court fails to charge the jury upon the legal effect of evidence to impeach witnesses is not reversible error; especially where no instruction is asked on the question, and the court says to the jury that they are the "sole judges of the credibility of the witnesses and of the weight to be given to their testimony."

Special cross reference. For further cases citing the text, and many others on the question, and in this connection, see annotations under Rule 2 of Owen v. Owen (22 Iowa 270), ante. p. 30.

HAMILTON v. DUBUQUE BRANCH OF STATE BANK, 25 IOWA 593

(Abstract.)

1. Pleadings—Reply, When Necessary—What Allegations in Answer Impliedly Controverted—Evidence in Such Case.—Under the Code of 1860, allegations in an answer not in the nature of a counterclaim, set-off, or cross-demand, are controverted by operation of law.

Where allegations in an answer are denied by operation of law, the plaintiff may introduce proof of any defense or avoidance which he could plead in a reply thereto, pp. 596, 597.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Rule 2 of Smith v. Milburn (17 Iowa 30), Vol. II, p. 485.

Annotations to Decisions Reported in Volume 26 Iowa

VIELE *v.* GERMANIA INSURANCE CO., 26 IOWA 9, 96 AM. DEC. 83

1. Trial—Burden of Proof, Who Has—Opening and Closing Arguments—Discretion of Trial Court—Abuse—Reversal.—The burden of proof is upon the party, who, under the state of the pleadings and record and without the introduction of any evidence, would fail in the action; and he is entitled to the opening and closing arguments.

But the trial court has a large judicial discretion upon the question of awarding the burden of proof and the opening and closing arguments, and his decision thereon will not be ground for reversal except in case of manifest abuse thereof, p. 45.

Reaffirmed as to second paragraph in Van Horn *v.* Smith, 69 Iowa 147, 12 N. W. 792; *White v. Adams*, 77 Iowa 297, 42 N. W. 200.

Reaffirmed and explained as to second paragraph in Shaffer *v.* Des Moines Coal & Hay Co., 122 Iowa 236, 98 N. W. 112, holding that in order to allow a reversal on account of the ruling of the trial court in awarding the opening and closing arguments, there must be a very clear case of abuse of discretion and resulting prejudice shown upon appeal.

Reaffirmed and qualified in Milwaukee Harvester Co. *v.* Crabtree, 101 Iowa 529, 70 N. W. 705, holding, however, that it is not an abuse of discretion for the trial court to award the opening and closing arguments to the party upon whom the evidence casts the burden.

Cross references. See further on this question, annotations under Rule 5 of *Fountain v. West* (23 Iowa 9), ante, p. 74; Rule 2 of *Woodward, Adm'r v. Lavery* (14 Iowa 381), Vol. II, p. 250; Rule 2 of *Smith et al, v. Cooper, et al*, (9 Iowa 376), Vol. I, p. 592.

2. Practice—Consolidation of Causes—When Allowed.—Where insured sues four fire insurance companies in separate actions in the same court for their respective proportion of a loss under a policy of insurance wherein each agreed to be liable separately for one-fourth of the total amount of the insurance, the court is equally divided on the question of whether or not a consolidation of the causes by the trial court in order to avoid four trials, was proper, pp. 45, 46.

Cited in Cox Shoe Co. *v.* Adams, 105 Iowa 412, 75 N. W. 319, the court holding that in order to avoid a multiplicity of suits and

trials, a court of equity has the inherent power to consolidate causes, where there is an identity of parties, interest, and subject-matter; and especially where the consolidation works no injury.

3. Insurance Companies—Waiver of Conditions in Policy—What is—May be by Parol—Estoppel.—Forfeiture of a policy of insurance on account of breach by insured of conditions therein declaring a forfeiture, may be waived by the insurer or company and it will thereby be estopped from claiming such forfeiture when sued on the policy.

Such waiver need not be in writing, but may be by parol. And besides an express waiver, circumstances proving that insurer (company) treated the contract as subsisting and not forfeited, a course of dealing consistent only with that hypothesis, and acts and declarations whereby insured was induced to believe that the condition was dispensed with or forfeiture waived, will estop the insurer from claiming or relying upon the forfeiture, pp. 49, 52-55.

Reaffirmed in Hollis v. State Ins. Co., 65 Iowa 458, 459, 21 N. W. 776; Siltz v. Hawkeye Ins. Co., 71 Iowa 715, 29 N. W. 608; Glasscock v. Des Moines Ins. Co., 125 Iowa 172, 173, 100 N. W. 504.

Reaffirmed and explained in Walsh v. Ætna Life Ins. Co., 30 Iowa 142, 143, 6 Am. Rep. 664, holding—as does the present case—that acceptance of premiums and the giving of a receipt therefor by an agent of insurer who has authority to collect premiums and receipt therefor, with knowledge of a breach by insured of a condition of a policy working a forfeiture thereof, estops the company from thereafter claiming or relying on the forfeiture.

Reaffirmed and explained in Mershon v. Nat'l Ins. Co., 34 Iowa 89; Williams v. Niagara Fire Ins. Co., 50 Iowa 568; Bloom v. State Ins. Co., 94 Iowa 364, 365, 62 N. W. 812, holding—as does the present case—that the receiving by an insurance company of the premium on a policy after the occurrence of facts upon which the company might declare it forfeited, and with full knowledge thereof, waives the right to treat it as forfeited therefor: And that this is the rule although the policy provides that none of its conditions can be waived except by written indorsement thereon.

Reaffirmed and explained in Young & Co. v. Hartford F. Ins. Co., 45 Iowa 380-382, 24 Am. Rep. 784, holding that the prepayment of the premium may be waived by a general agent, even when the policy recites that it shall not be binding until the cash portion of the premium is actually paid in money, and although the policy provides that no condition thereof can be waived except by indorsement thereon in writing: Hence holding that where an agent of an insurance company with authority to issue and deliver policies, issues and delivers a policy of insurance, agreeing with insured that the policy is to take effect from its date and that the insured could pay the premium

within a certain time thereafter, and that insured accepted the policy relying upon the agreement, and both parties treated the policy as valid, it is binding and effective, although it provides for a prepayment of premium as a requisite to validity and that all conditions must be waived by indorsement in writing thereon.

Reaffirmed and explained in Green v. Des Moines Fire Ins. Co., 84 Iowa 137, 138, 50 N. W. 559, holding that where insured furnishes proofs of loss, and writes the insurer asking it to inform him "if there is anything lacking," whereupon the insurer replies indicating that steps will be taken at once to determine and adjust the loss, the insurer is thereby estopped to thereafter claim that the proofs were insufficient.

Reaffirmed and explained in O'Leary Bros. v. German-American Ins. Co., 100 Iowa 397, 398, 69 N. W. 687; Ruthven Bros. v. American Fire Ins. Co., 102 Iowa 552-557, 71 N. W. 574, holding that where an adjustment agent of a fire insurance company intentionally leads insured to believe that he need not make proofs of loss, and the latter acts and relies thereon, such proofs are waived, although the policy provides that conditions thereof can only be waived by indorsement in writing thereon.

Reaffirmed and varied in Camp v. Wiggins, 72 Iowa 644, 34 N. W. 462, holding that the receipt of purchase money of land by a vendor under contract to convey, with knowledge that it had been assigned without his (vendor's) consent in writing, waives such a condition in the contract, and estops the vendor from claiming or relying thereon when sued in equity by the assignee for specific performance.

Reaffirmed in part and varied in Cheshire v. Taylor, 29 Iowa 494, holding that want of demand on the maker of a negotiable instrument and notice thereof, may be waived by the acts, admissions and promises of an indorser thereof; and that such facts constituting the waiver, may be proved by parol evidence.

Reaffirmed and qualified in Garretson v. Equitable Mut. L. & Endowment Ass'n, 93 Iowa 411, 412, 61 N. W. 955, holding that the mere act of receiving assessments or dues with knowledge of an existing forfeiture, will not estop a mutual insurance association from setting up the forfeiture, unless the member, when he paid the assessments, had reason fairly to conclude from the acts and declarations of the association that the forfeiture had been or would be waived, or unless the payment was made in reliance upon the validity of the contract of insurance, induced by the acts, declarations, or silence of the society: And holding therefore that when such an association accepts a note and post-office order for assessments or dues for the reinstatement of one whose certificate or policy has lapsed, but with the definite understanding that the person would not be reinstated unless a sufficient health certificate was furnished, the retention of the note

by the association without attempt at enforcement, and the cashing of the order by mistake, does not waive the forfeiture upon the health certificate not being furnished.

Reaffirmed and narrowed in Jewett v. Home Ins. Co., 29 Iowa 565, holding that when neither a fire insurance company nor its local agent has notice or knowledge of a breach by insured of a condition declaring a forfeiture until after a partial loss thereunder, the fact that the company failed to pay the insured the balance of the unearned premium, and had the property not destroyed appraised, does not estop it from thereafter claiming and relying on the forfeiture when sued on the policy for the loss.

Cited in Stillman v. Wickham, 106 Iowa 599, 76 N. W. 1008, the case turning upon other questions.

Distinguished in Fuller & Johnson v. Phoenix Ins. Co., 61 Iowa 653, 654, 16 N. W. 274, holding that a party cannot under guise of a waiver of conditions make the policy cover property not described therein and not owned by the insured.

Distinguished in Bosworth v. Western Mut. Aid Society, 75 Iowa 583, 584, 39 N. W. 904, holding that when a certificate of membership in a mutual assessment insurance society provides that if the assessments are not paid within a time stated, the certificate shall be void, and there is nothing in the articles of incorporation or by-laws of the society limiting or restraining the meaning of the word "void," then upon the insured failing to pay any such assessment within the time given, the certificate is *void*, and of no effect—A case wherein a waiver of this condition was, however, pleaded, but held by the trial court not sufficiently proved, and the trial court's decision was upheld *in toto*.

Cross reference. See Rule 4 hereof.

4. Fire Insurance Companies—Agents of—Waiver of Conditions in and Forfeiture of Policy by Local Agent, When Valid.—A local agent of a fire insurance company who has power to effect contracts of insurance, to fix the rates of premium, to give consent to the increase of risk and change of use of buildings insured, and to cancel policies in his discretion, has the implied power, from the existence of the above powers, to waive or dispense with conditions in a policy of insurance, and to waive forfeiture by reason of breach of any condition therein, pp. 57-59.

Reaffirmed and explained in Alman, Miller & Co. v. Phoenix Ins. Co., 27 Iowa 207, 1 Am. Rep. 262, holding—as does the present case in argument—that agents of insurance companies are considered general agents, and corporations represented by them are bound by their acts which are within the scope of the general authority they possess, although in violation of limitation upon that authority, when such limitation thereon is not brought to the knowledge of a party dealing with them.

Reaffirmed and explained in Walsh v. Ætna L. Ins. Co., 30 Iowa 142, 143, 6 Am. Rep. 664, holding—as does the present case—that acceptance of premiums and the giving of a receipt therefor by an agent of insurer who has authority to collect premiums and receipt therefor, with knowledge of a breach by insured of a condition of a policy working a forfeiture thereof, estops the company from thereafter claiming or relying on the forfeiture.

Reaffirmed and explained in Mayer v. Mut. L. Ins. Co., 38 Iowa 308-310, 18 Am. Rep. 34, holding that when a person who is employed in the office of the general agent of an insurance company and who is paid by the company, calls upon an insured and collects and gives receipts for several premiums, and promises the insured to call upon him at his place of business and collect subsequent premiums when they were due, the insured has a right to rely thereon, and the company cannot claim a forfeiture of the policy by reason of the insured failing to go to the office and pay a premium when it became due.

Reaffirmed and explained in Young & Co. v. Hartford F. Ins. Co., 45 Iowa 380-382, 24 Am. Rep. 784, holding that the prepayment of the premium may be waived by a general agent, even when the policy recites that it shall not be binding until the cash portion of the premium is actually paid in money, and although the policy provides that no condition thereof can be waived except by indorsement thereon in writing: Hence holding that where an agent of an insurance company, with authority to issue and deliver policies, issues and delivers a policy of insurance, agreeing with insured that the policy is to take effect from its date and that the insured could pay the premium within a certain time thereafter, and that insured accepted the policy relying upon the agreement, and both parties treated the policy as valid, is binding and effective, although it provides for a prepayment of premium as a requisite to validity, and that all conditions must be waived by indorsement in writing thereon.

Reaffirmed and explained in King v. Council Bluffs Ins. Co., 72 Iowa 315, 316, 33 N. W. 692, holding that where a general agent of a fire insurance company who has power to pass upon risks, has knowledge of the breach by an insured of the conditions of his policy declaring a forfeiture, and such agent and the company thereafter treat the policy as valid, and the policy is renewed and the renewal premium collected, these facts amount to a waiver of the forfeiture by the company.

Reaffirmed and explained in Corson v. Anchor Mut. Fire Ins. Co., 113 Iowa 646, 647, 85 N. W. 808, holding that even the stipulations of a policy to the effect that they shall not be waived except in writing, may, themselves, be waived by an officer or agent having authority: Hence holding that where an adjuster of a fire insurance company, with full knowledge of breach by insured of a condition in

the policy declaring a forfeiture, proceeds to adjust a loss thereunder and requires insured to furnish proofs of loss, including duplicate invoices of the goods insured and destroyed, he thereby waives the forfeiture.

Reaffirmed, explained and qualified in Garretson v. Merchants' Ins. Co., 81 Iowa 729, 45 N. W. 1047; Kirkman v. Farmers' Ins. Co., 90 Iowa 459, 48 Am. St. Rep. 454, 57 N. W. 953, holding that agents of insurance companies with power to issue policies, may waive conditions in the policies and forfeitures arising thereon: But that agents possessing the limited powers of soliciting insurance, delivering policies and receiving premiums cannot waive conditions and forfeitures.

Reaffirmed and extended in Liquid Carbonic Acid Mfg. Co., and St. Clair v. Phoenix Ins. Co., 126 Iowa 228-230, 101 N. W. 750, holding that Sec. 1750 of the Code of 1897, was enacted for the express purpose of prohibiting the limitation of the powers of agents of insurance companies by provisions in the policies of insurance, or by contract, or the by-laws, or articles of incorporation of any such company; and that under such section, any officer, agent or other representative of an insurance company doing business in this state, who may solicit insurance, procure applications, issue policies, adjust losses or transact the business generally of such companies, shall be held to be the agent of such company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws or articles of incorporation of such company, to the contrary notwithstanding.

Cited in Watrous v. Des Moines Ins. Co., 144 Iowa 553, 123 N. W. 172, the case turning upon another question.

Distinguished in Critchett v. American Ins. Co., 53 Iowa 406-408, (cited in dissenting opinion, 414), 36 Am. Rep. 230, 5 N. W. 551, holding that a local agent of a fire insurance company who has only authority to receive applications for insurance and collect and transmit premiums, but who has no power to issue policies, cannot bind the company by an agreement extending the time of payment of an installment of the premium past the time it is due according to the policy; and that the company is not liable in such case for a loss occurring after the time such installment is overdue and not paid according to the terms of the policy.

Distinguished in State Ins. Co. v. Waterhouse, 78 Iowa 677, 43 N. W. 612, involving the construction of Secs. 2612 and 2613 of the Code of 1873, as to what agents of an insurance company may be served with original notice.

Cross references. See Rules 3 & 5 hereof. See further on this question, annotations under Rule 3 of *City of Davenport v. Peoria Marine & Fire Ins. Co.* (17 Iowa 276); Rules 1-5 of *Ayres v.*

Hartford Fire Ins. Co. (17 Iowa 176); Keenan v. Mo. State Mut. Ins. Co. (12 Iowa 126), Vol. II, pp. 527, 513, and 24, respectively.

5. Fire Insurance Companies—Breach by Insured of Condition Declaring Forfeiture—Failure of Company to Cancel and Return Unearned Premium—Waiver of Forfeiture.—The question of whether or not where a policy of fire insurance provides that the insurer reserves the right to cancel it upon the risk being increased, or for other stated cause, by paying to insured the *pro rata* of the unexpired premium, and the risk is increased or other such condition is broken by insured, of which the insurer has knowledge, or notice, but fails to so cancel the policy and return such premium, that these facts, of themselves, constitute a waiver of the forfeiture, is not determined, p. 64.

Cited in Victor v. Hartford Fire Ins. Co., 33 Iowa 215, the court holding that where a fire insurance company has forfeited and declared void a policy of insurance by reason of a violation by insured of a condition therein, that "if any change takes place in the title or possession of the property, whether by sale, legal process, judicial decree, voluntary transfer or conveyance * * * * then and in every such case this policy shall be void," the insured cannot maintain an action for the unearned premium nor can his creditor garnish the company therefor: And this although the policy may contain an additional provision that "This policy may be canceled at any time at request of assured, the company retaining customary monthly short rates for time policy has been in force; it may also be canceled at any time by the company, on giving written or verbal notice to that effect, and refunding or tendering ratable proportion of the premium for the unexpired term of the policy."

Cross reference. See rules 3 & 4 hereof, in this connection.

STATE v. THORNTON, 26 IOWA 79

1. Criminal Law—Accomplices—Corroboration of Testimony of—Sufficiency of to Justify Conviction.—In order to authorize the conviction of an accused person upon the testimony of an accomplice the latter must—under Sec. 4102 of the Code of 1860—be corroborated by evidence not only as to the commission of the offense or the circumstances thereof, but there must be further corroborative evidence tending to connect accused with the commission thereof, pp. 81, 82.

Reaffirmed in State v. Thompson, 87 Iowa 673, 54 N. W. 1078, under the Code of 1873.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

Cross references. See further on this question, annotations under Rule 2 of State v. Schlagel (19 Iowa 169), Vol. II, p. 711; State v. Tulley (18 Iowa 88), Vol. II, p. 712.

2. Criminal Law—Accessories, Aiders and Abettors are Principals.—Sec. 4668 of the Code of 1860 abrogates the distinction between an accessory before the fact and a principal, and, thereunder, all persons concerned in the commission of a public offense, whether they directly commit the act constituting it, or aid and abet in its commission though not present, are punishable as principals, p. 80.

Reaffirmed in State v. Smith, 106 Iowa 703, 77 N. W. 500, under Sec. 4314 of the Code of 1873, corresponding to the section of the text.

Cross reference. See further on this question, annotations under Rule 1 of State v. Brown (25 Iowa 561), ante. p. 295.

CORRELL v. GLASSCOCK, 26 IOWA 83

1. Pleadings—Amendment to Conform to Proof—Discretion of Trial Court.—Where after the testimony is all in and the argument to the jury is closed, the court allows a party leave to file an amendment to conform to the proof, and it is not, in fact, filed until after verdict, the ruling of the court will not be held to be an abuse of discretion and reversible error upon appeal to the Supreme Court, when it appears from the record that the party appealing and complaining was not taken by surprise or prejudiced thereby, p. 84.

Special cross reference. For cases citing, sustaining, explaining and extending the text, see annotations under Fulmer v. Fulmer (22 Iowa 230), ante. p. 23.

BROWN v. ELLIS, 26 IOWA 85

1. Certiorari—Pleadings—When Answer to Amended Petition is Unnecessary.—Where in a *Certiorari* proceeding the defendant fully answers the averments of the petition, and thereafter the plaintiff obtains leave to and files an amended petition which contains substantially the averments of the original, except such allegations as do not require denial, no further answer is required by defendant, and the averments of the amended petition will be treated as denied by the answer previously filed, p. 86.

Reaffirmed in Peacock v. Gleesen, 117 Iowa 293, 90 N. W. 611, in an action at law on a *quantum meruit*.

SWAN v. SMITH, 26 IOWA 87

1. Attachment—Allowance by Judge of Value of Property to be Attached—When Not Required—Claims Ex Contractu—Action for Breach of Contract.—An action for damages for breach of contract by reason of the seller of sheep representing them to be sound when they were in fact diseased, is an action founded upon contract; and the plaintiff is not required—under Sec. 3177 of the Code of 1860—in order to obtain an attachment therein, to present his

petition for an allowance of the amount in value of property to be attached, pp. 88, 89.

Reaffirmed and explained in McGinn v. Butler, 31 Iowa 163, holding that where the facts alleged show that the plaintiff's right of action arises out of a breach of contract, no allowance is necessary previous to suing out an attachment.

ROBINSON v. GOULD, 26 IOWA 89

1. Deeds—Delivery—Presumption from Acknowledgment and Recording.—Where a deed which is beneficial to the grantee is properly acknowledged by the grantor and is placed of record, the fact of its delivery will be presumed in favor of the grantee: And in an action by the grantor to set the deed aside the burden is on him to overcome the presumption and establish the fact of non-delivery, p. 93.

Reaffirmed in Stiles v. Beed, 150 Iowa 729, 130 N. W. 378.

Reaffirmed and explained in Cecil v. Beaver, 28 Iowa 246, 4 Am. Rep. 174, holding that where the deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes it to be recorded, this is in law a sufficient delivery to the infant, and the title to the lands conveyed will pass thereby.

Reaffirmed and explained in Hutton v. Smith, 88 Iowa 240, 241, 65 N. W. 326; Davis v. Davis, 92 Iowa 153, 60 N. W. 509, holding that although delivery of a deed may be presumed from the fact that it was executed, acknowledged and filed for record by the grantor, still this presumption may be overcome by proof that no delivery was intended; as the delivery of a deed is always a question of the intention of the parties; and it is not complete until there is an acceptance by the grantee, or until it comes into his possession with the intention on the part of the grantor, assented to by the grantee, that it shall become operative.

Reaffirmed and explained in State v. Engle, 111 Iowa 252, 82 N. W. 765, holding that when a grantor of land acknowledges the deed and has it recorded with the intention that it pass title to the grantee, the delivery is complete as to the grantor; and that when the grantee thereafter recognizes the land as belonging to him, he thereby assents to or accepts the deed, and the title is complete in such grantee.

Reaffirmed and extended in Craven v. Winter, 38 Iowa 480, holding further that a deed which is in custody of the grantee, is presumed to have been delivered by the grantor, and accepted by the grantee, at the date of its execution.

Reaffirmed and varied in Parlin, Orensdorff & Martin Co. v. Daniels, 111 Iowa 642, 82 N. W. 1015; Stiles v. Beed, 150 Iowa 729, 130 N. W. 378, holding that possession of a deed by the grantee is *prima facie* evidence of its delivery as of the date thereof.

Reaffirmed and qualified in O'Connor v. O'Connor, 100 Iowa 480, 69 N. W. 677, holding that a deed is of no validity, unless it is delivered to the grantee; and where, without a previous agreement between the parties therefor, a deed is left by the grantor with the recorder to be recorded, it does not constitute delivery or acceptance by the grantee, and the grantor may at any time before such acceptance, order the return of the deed; and in such last case if the deed has been recorded, may sue in equity to have it canceled or declared ineffective.

Cited in In re Bell's Estate, 151 Iowa 91, 130 N. W. 799, not in point, but upon analogy.

Distinguished and narrowed in Wadsworth & Co. v. Barlow, 68 Iowa 601, 27 N. W. 776, holding that the mere execution and filing of a deed or other instrument for record, does not constitute acceptance of or delivery to the grantee: Holding, however, that where a person agrees to execute a mortgage on property specifically described in the agreement, and thereafter executes and files the instrument for record, acceptance of the mortgagee will be presumed, and it will be valid as against subsequent attachment, or judgment creditors of the mortgagor; but this last rule is inapplicable unless such agreement specifically and accurately names and describes the property on which the mortgage is to be executed: And that knowledge of the mortgagee of the execution and filing for record of a mortgage is not, of itself, an acceptance thereof by him.

Unreported citation, 104 N. W. 479; 112 N. W. 197.

Cross reference. See further on this question, annotations and cross references under Day v. Griffin (15 Iowa 104), Vol. II, p. 310.

DELANCEY v. HOLCOMB, 26 IOWA 94

1. Replevin—When Demand Not Required Before Commencing Action.—When the taking of personal property is wrongful, the owner may maintain replevin without demanding the return of the property before commencing the action.

So where both plaintiff and defendant claim the ownership of an animal, and the defendant takes possession thereof, without the plaintiff's consent and when it is running at large with other animals of plaintiff, the plaintiff may maintain replevin without making a demand, pp. 95, 96.

Reaffirmed, explained and extended in Jones v. Clark, 37 Iowa 591, holding that in actions of replevin and detinue a demand is unnecessary to be shown when the property is taken wrongfully; and when both parties claim title to the property and the right of possession, no demand is necessary to support an action of replevin; and when the possession is held under a claim of title, which is determined to be unlawful, it is obvious that a demand is not required; for the possession in this last case is not lawful.

Distinguished in Ch. B. & Q. R. R. Co. v. Pierce, 138 Iowa 509, 510, 116 N. W. 594, holding that a third person cannot maintain replevin for personal property taken by an officer under an execution without first giving the officer notice of ownership as required by Sec. 3991 of the Code of 1897; and that in such replevin action, the plaintiff must aver and prove that such notice was given.

Unreported citation, 133 N. W. 745.

Cross reference. See further on this question, annotations under Rule 2 of Smith & Co v. McLean (24 Iowa 322), ante. p. 187.

MCNAMEE v. MORELAND, 26 IOWA 96

1. Adverse Possession—What Constitutes.—In order to constitute adverse possession of land such as will bar the true owner from its recovery, the possession must be under color or claim of title, and must be open, notorious, adverse and hostile to the rights of the former; and must be continued for the statutory period of ten years, pp. 107-111.

Reaffirmed in Grube v. Wells, 34 Iowa 149-152; Van Ormer v. Harley, 102 Iowa 157, 71 N. W. 243.

Reaffirmed and explained in Litchfield v. Sewell, 97 Iowa 250, 251, 66 N. W. 105, holding that a void deed, or even a deed void on its face, may constitute such color of title as will support a claim of adverse possession: Provided that the claimant acts in good faith believing that he has title, but not otherwise: But that there can be no adverse possession when the party claiming thereunder knew that he had no title; and occupation of land under these latter circumstances, confers no right.

Reaffirmed and explained in Gallaher v. Head, 108 Iowa 590, 79 N. W. 388, holding that where a party who claims right to land by adverse possession, recognized the right or title of the true owner during the time which would otherwise grant him the right, there is no adverse possession.

Cross references. See further on this question, annotations under Burdick v. Heivly (23 Iowa 511), ante. p. 130; Rule 1 of Jones v. Hockman (12 Iowa 101), Vol. II, p. 19.

2. Res Adjudicata—What Constitutes—Who Former Judgment Binding upon.—A former judgment upon a trial on the merits, binds parties and privies and is *res adjudicata* as to them, as to all matters involved in the action.

And a judgment binds a person who, though not a party to the action, is notified of its pendency, is interested in its defense, and in fact conducts the defense, although in the name of a party thereto, pp. 111-113.

Reaffirmed and explained in Stoddard v. Thompson, 31 Iowa 82, holding that one who, though not a party, defends or prosecutes an

action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein.

Reaffirmed and explained in Marsh v. Smith, 73 Iowa 297, 34 N. W. 867, holding that one who, though not a party to an action, is interested in the controversy and employs counsel to aid in its defense, is bound by the judgment therein.

Reaffirmed and explained in Citizens' Nat'l Bank of Davenport v. City Nat'l Bank of Clinton, 111 Iowa 213, 214, 82 N. W. 465, holding that when a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon himself the defense of it, he is no longer regarded as a stranger, because he has a right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record: That in every case if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not, of every fact established by it; but that in such case no judgment can be rendered against such a party who does not defend, and therefore the plaintiff may subsequently sue him upon the same cause of action.

Distinguished in Goodnow v. Litchfield, 63 Iowa 281, 282, 19 N. W. 229, holding that when a person contributes to the defense of an action, but has no real interest therein, and is not bound to any of the parties thereto by reason of its subject-matter, he is not bound by the judgment therein.

BRANDT v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co., 26

IOWA 114

1. Tender—What Insufficient—Damages Against Railroad Company for Killing or Injuring Stock.—A debtor, whether upon contract or for injuries resulting from the negligence of railway companies, is bound at his peril to tender enough to discharge his whole single liability, and if he does not, he will derive no advantage from his tender, p. 117.

Reaffirmed in Helphrey v. Ch. & R. I. R. R. Co., 29 Iowa 481.

CUNNINGHAM v. FELTER, 26 IOWA 117

1. Judicial Sales—Sale of Several Parcels or Lots of Land En Masse—Action to Set Aside—When Delay to Commence Action Defeats Right.—Although the sheriff's return shows that several parcels or lots of land were sold *en masse* under execution, yet this will not be sufficient to set aside the sale and deed made thereunder in an action in equity which is commenced by the execution debtor nearly six years after the date of the sale, when the delay in commencing

action is not excused, and it is not shown that the parcels or lots were sold for less than their value, or that the plaintiff (execution debtor) was injured by the mode of sale adopted, pp. 119, 120.

Cited in Conn. Mut. Life Ins. Co. v. Brown, 81 Iowa 44, 46 N. W. 750, holding that upon an execution sale of a divisible tract, or several tracts of land, if the entire tract, or the different tracts, for any reason, are more valuable when taken together, and will in that way sell for a larger sum, they may be so sold, and the sale will be subject to no objection by the land owner: That the fact that no bids were made when the land was offered in separate tracts, and it was, therefore, sold *en masse* raises a presumption that the land is more valuable when taken together, or, at least, that defendant in execution suffered no prejudice by the sale.

Special cross reference. For further cases citing the text, and others connected herewith, see annotations under Rule 2 of Wallace v. Berger (25 Iowa 456), ante. p. 285.

THOMSON v. WILSON, 26 IOWA 120

1. Trial—Evidence—Written Instrument Insufficiently Stamped—Time and How Objection to Admission in Evidence to be Made.—When a written instrument which is improperly stamped, as provided by the United States Revenue Act of 1864, is offered in evidence upon a trial, it must be objected to for such cause before it is admitted; and such an objection cannot be raised by an instruction to the jury, p. 121.

Reaffirmed in Chamberlain v. Robertson, 31 Iowa 412.

Special cross reference. For further cases citing the text, and others very important on this subject, see annotations under Hugus v. Strickler (19 Iowa 413), Vol. II, p. 743.

2. Pleadings—Amendment to Conform to Proof—When Allowed.—Under the Code of 1860, an amendment may be allowed to be filed to conform to the proof and in furtherance of justice, after verdict and pending a motion in arrest of judgment, pp. 121, 122.

Reaffirmed and extended in Davis v. Ch. R. I. & P. Ry. Co., 83 Iowa 745, 49 N. W. 78, (abstract), under Secs. 2686, 2689 of the Code of 1873, holding further that such an amendment in such case, may be filed by leave of court even after verdict and judgment.

STATE v. YOUNG, 26 IOWA 122

1. Criminal Law—Threatening to Injure Another to Extort Money—Indictment for—Sufficiency of.—Under Sec. 4213 of the Code of 1860, a person may be indicted for maliciously threatening to injure another to compel the latter to do an act against his will, without the indictment alleging that accused had the intent to thereby extort money or obtain a pecuniary advantage, p. 123.

Reaffirmed in State v. Todd, 110 Iowa 634, 82 N. W. 323, under Sec. 4767 of the Code of 1897, corresponding to the section of the text.

Unreported citation, 133 N. W. 333.

MCDONALD v. CHICAGO & NORTHWESTERN R. R. Co., 26 IOWA 124,
96 AM. DEC. 114

(Later Appeal, 29 Iowa 170.)

1. Pleadings—Amendment to Petition Increasing Amount of Damages Claimed.—In an action for damages it is not error for the trial court to allow the plaintiff to amend his petition, the amendment increasing the amount of the damages claimed, p. 138.

Unreported citation, 133 N. W. 656.

2. Railroad Companies—Duty to Provide Station Accommodations, Safe Platforms, Approaches and Grounds.—There is a Common Law duty imposed on a railroad company to provide reasonable accommodations at stations for the passengers who are invited and expected to travel on its road:

A railroad company is bound to keep in a safe condition all portions of its platforms and approaches thereto to which the public does or would naturally resort, and all portions of its station grounds reasonably near to the platforms, where passengers or those who have purchased tickets with a view to take passage on its cars, would naturally or ordinarily be likely to go, pp. 138, 139, 145.

Reaffirmed and explained in Matthieson v. B. C. R. & N. Ry. Co., 125 Iowa 92, 100 N. W. 52, holding that the duty enjoined upon a railroad company in respect to its passenger station platforms is that they shall be kept free from obstructions, and in such conditions generally as that passengers may go to and from trains with reasonable safety.

Reaffirmed, explained and extended in Cotant v. Boone Suburban Ry. Co., 125 Iowa 54, 69 L. R. A. 982, 99 N. W. 118, holding further that a railroad company must provide reasonably safe means of access to and from its stations or terminals for the use of its passengers, and passengers have the right to assume that the means of egress provided are reasonably safe; and that the company cannot delegate this duty to another and be thereby relieved from liability for damages resulting from personal injuries occasioned from a failure of such duty.

Reaffirmed, explained and extended in Merryman v. Ch. G. W. Ry. Co., 135 Iowa 593, 594, 113 N. W. 358, holding further that it is the duty of a railroad company to provide reasonably safe platforms for the use of passengers in boarding and leaving its trains; and that when the station platform is so much below the level of the lower steps of the car as to make it unsafe for passengers to alight without

an intermediate stool or step, it is the duty of the carrier to provide such step; but that the duty to furnish a safe platform, and a step or stool whenever it is necessary to make it safe, does not necessarily include the duty to assist alighting passengers: And holding, also, that the law requires a railroad company to exercise reasonable and ordinary care to light its platforms so that passengers may enter and leave trains with reasonable safety, but that the question of whether the station and platform were sufficiently lighted is, ordinarily, one of fact for the jury.

(Note.—See further, sustaining and explaining, but not citing the text, *Waterbury v. Ch. M. & St. P. Ry. Co.*, 104 Iowa 32, 73 N. W. 341; *Hiatt v. D. M. N. & W. Ry. Co.*, 96 Iowa 169, 64 N. W. 766.—Ed.)

Cross references. See further in this connection, *Gillis v. Railway*, 98 Am. Dec. 317; *Fullerton v. Fordyce*, 42 Am. St. Rep. 516.

3 Negligence—Damages for Personal Injuries—Evidence—Carlisle Tables.—In an action for damages for personal injuries resulting from the negligence of defendant where the evidence tends to show that the injuries received are permanent and that the plaintiff is thereby prevented, either totally or partially, from engaging in his avocation, the Carlisle Tables are receivable in evidence to show his expectancy of life.

And this is the rule under such circumstances in an action for personal injuries to a wife who is thereby disabled during her life from rendering effectual service to her husband and family in the discharge of her household duties, pp. 139, 140.

Reaffirmed as to first paragraph in *Knapp v. Sioux City & Pac. Ry. Co.*, 71 Iowa 48, 49, 32 N. W. 22.

(Note.—This citing case *overrules* *Nelson v. Ch. R. I. & P. Ry. Co.*, 38 Iowa 564, holding a doctrine contrary to the text.—And see, sustaining but not citing the text, *Simonson v. Ch. R. I. & P. Ry. Co.*, 49 Iowa 87.—Ed.)

SACKETT v. OSBORN, 26 IOWA 146

1. Vendor and Purchaser—Covenant in Deed Against Incumbrance—When Taxes Not an Incumbrance.—Where a vendor before November 1 of a certain year enters into a contract to convey land, and the purchaser pays part of the purchase price and enters into immediate possession and control of the property under the terms of the contract and before November 1 of the year, the vendor is not liable to the purchaser for the taxes of that year, as upon a breach of a covenant against incumbrances in a deed executed after November 1 of the year; as the sale was completed before that time, and Chap. 10, Acts of Ninth General Assembly (1862) provides that "all taxes upon real estate shall, as between vendor and purchaser, become a lien upon real estate on and after November 1st of each year," p. 147.

Cited in Rex Lumber Co. v. Reed, treasurer, 107 Iowa 115, 77 N. W. 573, not in point.

Special cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Miller v. Corey, Adm'r (15 Iowa 166), Vol. II, p. 319.

2. Contracts—Ratification—Effect—Contract by Husband to Convey Homestead—Failure of Wife to Join and Concur in—Subsequent Execution of Deed by Both—Effect.—The ratification by a party of a contract concerning property in which he has an interest, has the same effect as if authority had been previously conferred, and the contract becomes effectual as of the date of the execution of the contract.

So where a husband enters into a contract to convey homestead in which his wife does not join and concur, and the purchaser pays part of the price and enters into possession thereof under the terms of the contract, the subsequent joint execution by both husband and wife of a deed thereto, operates as a ratification of the contract by the wife, and the sale is considered as of the date of the execution of the contract by the husband, pp. 147, 148.

Reaffirmed and extended as to first paragraph in Frost v. Clark, 82 Iowa 304, 48 N. W. 84, holding further that the performance by an executor of a voidable contract concerning land and the subsequent approval thereof by the orphans' court has the same effect as if it were so originally executed and approved, and renders it binding.

Cross reference. See further on this question, annotations and note under Rule 3 of Dubuque Female College v. Dist. Township of Dubuque (13 Iowa 555), Vol. II, p. 186.

BAKER v. WASHINGTON COUNTY, 26 IOWA 148

1. Swamp Lands—Power of Board of Supervisors of County to Employ Agents Concerning.—Under Chap. 160, Acts of 1862, a county board of supervisors has power to appoint and provide for compensation of an agent to ascertain witnesses and take testimony establishing the swampy character and quantity thereof, etc., in the county, but has no power to employ an agent or provide for his compensation for services rendered before the general land office at Washington, D. C., in reference to the county's swamp land claims.

Under such Act the Federal departments transact business only with State agents appointed by the Governor, pp. 152-154.

Distinguished in Allen v. Cerro, Gordo County, 34 Iowa 64, holding that a county may contract with a person whereby he is to render all services, prepare all proofs, furnish all agents and counsel, and prosecute its claims for swamp lands before the department at Washington, D. C., such person to be paid therefor in a portion of the lands, money or scrip recovered.

Special cross reference. For further cases citing the text, and others in this connection, see annotations under Webster County, v. Taylor (19 Iowa 117), Vol. II, p. 703.

2. Contracts—Part Void and Part Valid—When Valid Part Will be Enforced.—Where a contract contains provisions some of which are void and some of which are valid, and the provisions are severable, the valid provisions will be upheld and enforced, pp. 152-155.

Reaffirmed in Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa 241, 242, 91 N. W. 1084, the court upholding as valid an ordinance granting a franchise and which contained a severable void provision.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

SOWDEN & CO. v. CRAIG, 26 IOWA 156, 96 AM. DEC. 125

1. Fixtures—Chattel Mortgage on—Rights of Mortgagee—Subsequent Purchasers or Incumbrancers with Notice—Subsequent Mechanic's Lien.—Where the owner of real estate executes a mortgage upon chattels which may properly be made fixtures, and subsequently affixes them to the real estate, no person having knowledge of such facts can, by purchase of the real estate or otherwise, acquire from the mortgagor any title to such chattels paramount to the mortgagee thereof.

And this rule applies as against a merchant who performs labor in the annexation of the personalty to a building, as fixtures, after the mortgage is executed and recorded, pp. 163, 164.

Reaffirmed in Miller v. Wilson, 71 Iowa 614, 33 N. W. 130.

Cited in Denham v. Sankey, 38 Iowa 270, 271, the court holding that a mill which can be removed from the realty without injury to the latter, and which is treated by its owner as personal property and is assessed as such for taxation, must be regarded as personal property as between the owner and his grantee or mortgagee, and the latter and assigns.

CONOVER v. EARL, 26 IOWA 167

1. Promissory Note—Owner May Sell Distinct Interests in to Several Persons—Rights of Persons Buying—Trover and Conversion.—The owner of a note may sell distinct shares thereof to different persons, who thus become co-owners; and the interest thus acquired by one co-owner is such as to enable him to protect it by an action; and he may maintain trover if a co-owner be guilty of a conversion, p. 169.

Cited with approval in Vogel v. Wadsworth, 48 Iowa 32, the case involving other points.

TINSDALE v. CONNECTICUT MUTUAL LIFE INS. CO., 26 IOWA 170, 96
AM. DEC. 136

(Later Appeal, 28 Iowa 12.)

1. Evidence—Death—Presumption of From Absence, Etc.,—When Arises in Less than Seven Years.—Where a person is absent from his home for an unreasonable length of time without apparent reason, and without being heard from, his death may be presumed before the lapse of seven years, from facts and circumstances other than when last seen or heard from he was in a situation of peril.

And in such case any facts or circumstances relating to the character, habits, condition, affections, attachments, prosperity and objects in life, which usually control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence, pp. 175-177.

Reaffirmed in Leach v. Hall, 95 Iowa 618, 619, 64 N. W. 792.

Reaffirmed in Seeds, Ex'r, and Gd'n v. Grand Lodge of A. O. U. W., 93 Iowa 117, 183, 61 N. W. 411, 413, a case wherein the facts and circumstances surrounding a husband's absence from his family and his silence, were held not to warrant the presumption of his death even after the lapse of seven years.

Cited in Sherod v. Ewell, 104 Iowa 255, 73 N. W. 494, the court holding that a presumption of the death of a party does not arise until after he has been absent, without intelligence concerning him, for the period of seven years.

(Note.—This last citing case involves the *presumption of fact of death raised by law* by reason of a person's unexplained absence from home for seven years without being heard from, and not the *presumption raised by proof*, as in the text, from such absence for a less period of time.—Ed.)

And see 146 Iowa 4, 123 N. W. 170.

SINGER v. CAVERS, 26 IOWA 178

1. Pleadings—Demurrer—What to Contain—Insufficient Demurrer.—Under Sec. 2877 of the Code of 1860, a demurrer to a petition in an action at law because "it does not state facts constituting a cause of action," is too general, and must be overruled, p. 179.

Reaffirmed in Slafter v. Concordia Fire Ins. Co., 142 Iowa 121, 120 N. W. 708, under Sec. 3575 of the Code of 1897, applying the rule to a demurrer to an answer.

Reaffirmed and explained in In re Estate of McMurray, 107 Iowa 650, 78 N. W. 691, holding that under Sec. 3562 of the Code of 1897, a demurrer in a special proceeding which is in general terms will not be considered.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

2. Pleadings—Demurrer to Petition Where Part of or One Count is Good—Practice.—A demurrer to a petition part of which, or a count of which is good, must—under the Code of 1860—be overruled, pp. 179, 180.

Reaffirmed in Bonney v. Bonney, 29 Iowa 450, applying the rule to such a demurrer to such an answer.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

GARLAND v. WHOLEHAM, 26 IOWA 185

1. Damages—When Punitive Damages are Recoverable—Nature and Object of.—Punitive damages may be allowed within the discretion of the jury in all civil actions arising from the malicious, or oppressive act of the defendant, or where an element of fraud is shown. The allowance of punitive damages against the defendant in a civil action for any of the acts mentioned, has nothing to do with any criminal penalty which may be denounced against the commission of any such act; and it is distinct from anything connected with the wrong done the public or the State, p. 186.

Special cross reference. For cases citing, sustaining and distinguishing the text, and many others, see annotations under Rule 1 of Hendrickson v. Kingsbury (21 Iowa 379), Vol. II, p. 918.

MILLER v. DAWSON & CONGER, 26 IOWA 186

1. Limitation of Actions—Payment on Note Before Action Barred.—Whether under the Code of 1860, the acknowledgment of indebtedness from making a payment on a note before action thereon is barred will continue it in life for the statutory period after that time, or whether there must, in all cases, be a writing signed by the party to be charged, is a question not free from difficulty under the statute, and is not herein decided, p. 188.

Cited in Parsons v. Carey, 28 Iowa 433, the court holding that under Sec. 2751 of the Code of 1860, a part payment on a promissory note is not sufficient to take the case out of the statute of limitation or prevent the bar thereof; but that in all cases the promise of the debtor must be in writing, signed by the debtor, in order to take the case out of the statute or prevent the bar.

RICHMOND v. DUBUQUE & SIOUX CITY R. R. CO., AND ILLINOIS CENTRAL R. R. CO., 26 IOWA 191

(Later Appeals, 33 Iowa 422; 40 Iowa 264.)

1. Public Policy—Contracts Against—When Courts to Declare Contracts Void for.—The power of courts to declare contracts void

for being in contravention of sound public policy, is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt, p. 202.

Reaffirmed and explained in Cole v. Brown-Hurley Hardware Co., 139 Iowa 490, 491, 16 Am. & Eng. Ann. Cas., 846, 117 N. W. 747, 748, holding that no court should hesitate to declare void any agreement or contract to corrupt or improperly influence the official conduct of any public servant, but it is an equally sound principle which leads courts to declare that before applying such remedy, and permitting one who has received a valuable consideration for a promise fair upon its face to escape its performance by pleading the invalidity of his own agreement, such fatal defect therein must be so clear as to be free from doubt.

Cited in Geiser Mfg. Co., v. Krogman, 111 Iowa 510, 82 N. W. 940, the court holding that an agreement by a mortgagor of personal property that the mortgagee may take the property and sell at public auction without pursuing the statutory provisions respecting foreclosure, and that the former waives damages by reason thereof, is valid.

Unreported citation, 123 N. W. 992.

2. Contracts—Breach of—Damages—Measure of.—Where a railroad company contracts with an elevator company to allow it to handle "all through grain," and thereunder the railroad company allows it to handle only part of such grain, then in an action by the elevator company against the railroad company for damages for breach of contract, the measure of damages is the difference in the price the plaintiff was to receive for handling the grain which was not furnished and the expenses and expenditures incurred in being prepared to so handle it, or, if no such expenses or expenditures were incurred, the amount of the price agreed to be paid for handling the grain had it been furnished, pp. 194, 203, 204.

Cited in Howe Machine Co. v. Bryson, 44 Iowa 166, 168, 169, 171, (dissenting opinion), 24 Am. Rep. 735, the majority court holding that in an action for damages by reason of a sewing machine agent failing to furnish plaintiff with all the machines he could sell at twenty-five per cent. below the retail cost, the measure of damages is the value of the plaintiff's time lost by reason of the defendant's breach of contract, and his necessary expenses and expenditures while he was pursuing the contract before defendant's breach thereof.

PRESTON v. WALKER, 26 IOWA 205, 96 AM. DEC. 140

1. Trial—Practice—Burden of Proof—Opening and Closing Argument—Discretion of Trial Court—Reversal on Appeal, When.—The trial court has a large judicial discretion in the matter of award-

ing the burden of proof, and the opening and closing argument to the jury, and his ruling thereon will not be ground for reversal upon appeal, except where a clear case of abuse thereof and resulting prejudice is made out, p. 208.

Reaffirmed in Bates v. Bates, 27 Iowa 113, 1 Am. Rep. 260; Ashworth v. Grubbs, 47 Iowa 354; Dent v. Smith, 53 Iowa 265, 5 N. W. 145; Names v. Dwelling House Ins. Co., 95 Iowa 645, 64 N. W. 629; Milwaukee Harvester Co. v. Crabtree, 101 Iowa 529, 70 N. W. 705; Shaffer v. Des Moines Coal & Hay Co., 122 Iowa 235, 236, 98 N. W. 112; Farmer v. Norton, 129 Iowa 90, 105 N. W. 372.

Reaffirmed and explained in Breiner v. Nugent, 136 Iowa 334, 111 N. W. 450, holding that the order of argument and the conduct thereof, while prescribed by statute in a general way, is nevertheless peculiarly within the discretion of the trial court, and, in the absence of a showing of a clear abuse thereof, and of ground for believing that prejudice resulted, no reversal should be had on account of failure to follow the statute.

Cited with approval in Schoonover v. Osborne, 117 Iowa 441, 90 N. W. 849, the case turning on other points.

Cross reference. See further on this question, annotations and cross references under Rule 1 of Viele v. Germania Ins. Co. (26 Iowa 9), ante. p. 298.

2. Interest to be Paid Annually—Compound Interest.—Where a promissory note provides that the interest is to be paid annually, the payee or holder is entitled to the legal rate of interest on the interest after it is due at the end of each year.

And the above is the rule although the note was executed and payable in New York, where the legal rate is seven per cent., when the note is sued on in this State, pp. 209, 210.

Reaffirmed in Burrows v. Stryker, 47 Iowa 481.

Reaffirmed as to first paragraph in White & Smith, v. Savery, 50 Iowa 520.

Reaffirmed and extended in Ragan v. Day, 46 Iowa 240, allowing interest on interest at the rate of ten per cent. per annum, where the note provided that it was to bear "interest at the rate of ten per cent. payable quarterly. All interest not paid when due to bear interest at the rate of ten per cent."

Reaffirmed and narrowed in Rew v. Independent School Dist. of Sioux City, 125 Iowa 38, 39, 106 Am. St. Rep. 282, 98 N. W. 806, holding that a clause in a contract, or note for the payment of money providing that there shall be interest upon interest in semi-annual rests, does not allow interest upon the interest allowed by law after the maturity of the instrument, in the absence of an express stipulation therefor therein.

Cited in Dorr Cattle Co. v. Des Moines Nat'l Bank, 127 Iowa 165, 4 Am. & Eng. Ann. Cas. 519, 98 N. W. 918, the court holding that

in an action for damages the *lex fori* governs the character and extent of the remedy, unless the remedy has been created inferentially or directly with the Right and has become part of it by the statute of another state.

Cross references. See further on this question, annotations under *Aspinwall v. Blake* (25 Iowa 319), ante. p. 270; *Hershey v. Hershey* (18 Iowa 24), Vol. II, p. 577; *Mann v. Cross* (9 Iowa 327), Vol. I, p. 584; *Isett & Brewster v. Oglevie & Co.*, (9 Iowa 313), Vol. I, p. 581.

See, also, in this connection, annotations under *Arnold v. Potter*, (22 Iowa 194), ante. p. 19.

MURDOCK v. MELHOP, 26 IOWA 213

I. Partnership—Debts of Members—Assets of Firm—How Computed as Between Parties.—In the absence of an express agreement to the contrary the debt of one partner in the excess of that of his co-partner is, as between the parties, to be considered part of the assets of the firm, and not the entire amount of the larger debt, p. 215.

Unreported citation, 91 N. W. 1071.

Cross reference. See further on this question, annotations under Rule 2 of *Carl v. Knott* (16 Iowa 379), Vol. II, p. 446.

GRIFFITH, ADM'R, v. LOVELL, 26 IOWA 226

I. Res Adjudicata—Who Judgment Binds.—A judgment or decree binds parties and privies. And a decree canceling a deed of trust, entered in an action in which the heirs of the grantor (debtor), he being dead, and the payee of the note the deed was given to secure, are parties, does not bind or affect the rights of the assignee of the note who is not a party to the action, pp. 229, 230.

Reaffirmed in *Stoddard v. Burton*, 41 Iowa 585, holding that a judgment that a note is paid, entered in an action between the maker and payee, does not affect the rights of a holder thereof who is not a party to the action.

Cited in *Fairfield v. McNany*, 37 Iowa 77, the court holding that a defendant need not set up legal or equitable defenses he may have against a demand sued on, but may suffer judgment on the latter, and bring an independent action on the former: That when a defendant has a legal or equitable defense to an action, which exceeds plaintiff's demand, and suffers judgment therein, he cannot be compelled as garnishee to pay the judgment to a creditor of the judgment creditor.

(Note.—There are cases holding that where one who has an interest in the subject-matter of an action and assists in its defense, he is bound by the judgment although not a party.—Ed.)

Cross reference. See further on this question, annotations, note and cross reference under Rule 1 of *Myers v. Johnson County* (14 Iowa 47), Vol. II, p. 203.

2. Mortgage or Deed of Trust on or to Land—Subsequent Sale of Land in Parcels to Several Distinct Persons—Redemption by One—Contribution.—Where land on or to which there is a mortgage or deed of trust, is later sold in parcels to several distinct persons, then if one of the purchasers redeems from the incumbrance, he may enforce ratable contribution from the others, pp. 232, 233.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Rule 1 of *Massie v. Wilson* (16 Iowa 390), Vol. II, p. 447.

PRATT v. WESTERN STAGE CO., 26 IOWA 241

(Later Appeal, 27 Iowa 363.)

1. Appeal to Supreme Court—Supersedeas Bond and Notice Both Necessary to Perfect—Stay of Proceedings.—Under the Code of 1860, an appeal to the Supreme Court is not perfected until service of notice thereof; and merely filing a supersedeas bond without the giving of notice at least to the district court clerk, will not perfect the appeal. And in such case the execution of a judgment should not be stayed unless a supersedeas bond is filed and approved, and unless, also, notice of appeal is served, at least upon the clerk, p. 242.

Reaffirmed in *Oyster v. Bank*, judge, 107 Iowa 43, 77 N. W. 525, holding—under the Code of 1897—that when an order stays the enforcement of a judgment for a certain number of days, it does not affect its enforcement after that time, unless an appeal is meanwhile perfected by notice and other steps required by law.

Cited in *Loomis v. McKenzie*, 57 Iowa 81, 8 N. W. 781, the court holding that a supersedeas bond is not necessary—under the Code of 1873—to perfect an appeal.

MCCLURE v. OWEN, 26 IOWA 243

1. Contracts—Courts May Declare Contract Void—Constitutional Law.—Courts may declare contracts void for want of power in the contracting parties, form of the contracts, or because they are contrary to statute, Common Law, public policy or other like cause; and the Courts are not inhibited from so doing by the Constitution forbidding laws impairing the obligation of contracts, pp. 247, 248.

Cited in *Howells v. Patton*, 26 Iowa 549, (dissenting opinion), the majority court opinion not in point.

2. Counties—Power to Subscribe to or Issue Bonds for Stock in Railroads—Power of Legislature to Authorize.—Counties have no power to subscribe to stock in or to issue bonds in aid of railroads:

and the General Assembly has no power under the Constitution of 1857 to pass a law empowering counties to do such acts, p. 250.

Special cross reference. For cases citing and partially overruling the text, and many others, see annotations under Rule 1 of State, ex rel, B. & M. Riv. R. R. Co. v. Wapello County (13 Iowa 388), Vol. II, p. 165.

3. Constitutional Law—State Constitution and Laws—Construction of by United States Supreme Court—Force and Effect of Its Decision on.—The decision of the Supreme Court of the United States construing the Constitution or a law of a state is not binding on the state court as an authority, where it conflicts with the decisions of the state Supreme Court.

But the Supreme Court of the United States may disregard the decisions of the state court upon such questions and enforce its own decisions in cases wherein it has jurisdiction, p. 249.

Cited in Ex parte Holman, 28 Iowa 179 (dissenting opinion), the majority court holding that *habeas corpus* will not issue from a state court to test the question of whether or not a person is unlawfully detained under a process or warrant issued from a United States Court.

Cited in Clark v. Wolf, 29 Iowa 208, (dissenting opinion), the majority court opinion reaffirming the second paragraph of the text, and holding—as does the ex parte Holman case above—that the decision of a federal court on the question of the sufficiency of a defense in an action therein pending is conclusive, and cannot be collaterally attacked or impeached.

STATE v. WEBB, 26 IOWA 262

1. False Pretenses—Obtaining Money or Property by—Mere Matters of Opinion—Insufficient Indictment.—Where one is accused of obtaining money or property by false pretenses, and the indictment shows that the false representations claimed to constitute the crime consisted of mere matters of opinion, the indictment is bad upon demurrer, p. 264.

Distinguished in State v. McConkey, 49 Iowa 506, holding that where one points out a particular lot to a purchaser as that sold to him, and conveys another lot which is worthless, he is guilty of obtaining money or property by false pretenses; and that the indictment therefor need not allege that the accused was not the owner of the lot which he pointed out, but did not convey.

SOPER v. HENRY COUNTY, 26 IOWA 264

1. Counties—Liability of County for Injuries Occasioned by Unsafe "County Bridge"—What are "County Bridges."—The county is liable upon analogy to that of municipal corporations with

respect to their streets; for injuries occasioned by the unsafe condition of a "county bridge," that is a bridge requiring an extraordinary expenditure of money to build and maintain, and which it is the duty of the county under the statute (Secs. 312, 710 of the Code of 1860) to build, maintain and keep in repair, and to levy a bridge tax therefor. But the county is not liable for an injury occasioned by a small defective bridge which the law contemplates shall be built and kept in repair by a road district, pp. 269-271.

Reaffirmed and explained in Chandler v. Fremont County, 40 Iowa 59, 60; Taylor v. Davis County, 40 Iowa 296, 297, holding that it is the duty of the road district to erect and keep in repair small bridges within its limits which require no extraordinary expenditure of money therefor; and that a bridge which costs from five to seventy-five dollars is such an one: Holding, also, that a county is not liable in damages for injuries resulting from defects in such a bridge.

Reaffirmed and explained in Moreland v. Mitchell County, 40 Iowa 396-398, holding that a county is bound to erect and keep in repair "county bridges," or those which are large and require an extraordinary expenditure of money; and that this includes the duty of the county to erect railings or barriers on the sides of approaches thereto: Hence holding that a county is liable in damages for injuries resulting from its failure to erect railings or barriers on the sides of approaches to a bridge; and that where a horse takes fright, and by reason of the absence of such railings or barriers, throws and injures its rider, the county is liable in damages therefor.

Reaffirmed and explained in Cooper, Adm'r, v. Mills County, 69 Iowa 354, 355, 28 N. W. 635; Weirs v. Jones County, 80 Iowa 354, 45 N. W. 883, holding that a county must exercise, in the building, maintaining and keeping county bridges, such care as reasonably prudent and careful men would use in the conduct and management of their own affairs of like importance—failing which it is liable for injuries to a person occasioned thereby.

Reaffirmed and extended in Albee v. Floyd County, 46 Iowa 178, holding further that an approach to a county bridge is part thereof: And holding, also, that the fact that a part of the cost of construction of the bridge and approach, which together constitute in law the bridge, was contributed by another corporation or by citizens, does not relieve the county of liability for negligence in its construction or in keeping it in repair.

Reaffirmed and qualified in Davis v. Allamakee County, 40 Iowa 217, 218, holding that where a bridge when built is safe, and it afterwards becomes defective, the county is not liable in damages for injuries resulting therefrom, until notice thereof to its agents, and a failure to repair within a reasonable time thereafter: Unless such defect be notorious and of long continuance, in which case the county is liable without such notice.

Cited in Long v. Boone County, 32 Iowa 183, the court holding that under Sec. 117 of the Code of 1851, the county had an implied authority to issue warrants to construct or aid in constructing a road or bridge.

Cited in Freeman v. City of Independence, 123 Iowa 4, 97 N. W. 1085, the court holding that under Secs. 753 and 757 of the Code of 1897, a city must keep bridges within its corporate limits in repair; and is liable in damages for personal injuries occasioned by such a bridge being out of repair.

Cited in Sells v. Dermody, 114 Iowa 346, 86 N. W. 326, the court holding that a road supervisor is not liable in damages for personal injuries resulting from the defective or unsafe condition of a bridge or portion of a public road, unless he has been notified thereof in writing as required by Sec. 1557 of the Code of 1897, and the accident or injuries occur or are inflicted after a reasonable time for making repairs has elapsed after such notice is given.

Cited in Collins v. City of Council Bluffs, 32 Iowa 328, 7 Am. Rep. 200, on the liability of a city for injuries resulting from accumulation of ice and snow on its streets, which it negligently fails to remove.

Cited in Wheeler v. City of Fort Dodge, 131 Iowa 575, 9 L. R. A. (New Series), 146, 108 N. W. 1060, on the question of the liability of a city for defective streets and obstructions therein.

Cited in Hawk v. Marion County, 48 Iowa 475, the case involving other duties and powers of the county board of supervisors.

Cited in Nelson v. Hamilton County, 102 Iowa 232, 71 N. W. 207, not in point.

Distinguished and narrowed in Weirs v. Jones County, 80 Iowa 353, 354, 45 N. W. 883, holding that where a county places a barricade or obstruction to a bridge which is defective or out of repair, and it is afterwards removed, it is not liable for personal injuries thereafter occurring, unless it has notice of the removal thereof, or, in the exercise of reasonable diligence, should have known it in time to have prevented the accident.

Distinguished and doubted in Kincaid v. Hardin County, 53 Iowa 433, 36 Am. Rep. 236, 5 N. W. 591, the court holding that a county is not liable in damages for injuries resulting from a defective, or improperly constructed court house.

Distinguished and doubted in Packard v. Voltz, Ray, and Butler County, 94 Iowa 279, 280, 58 Am. St. Rep. 396, 62 N. W. 758, holding that a county is not liable in damages resulting from a defectively constructed drain across a highway.

Cross references. See further on this question, annotations under McCullom v. Black Hawk County (21 Iowa 409), Vol. II, p. 920; Rule 1 of Bell v. Foutch (21 Iowa 119), Vol. II, p. 880; Mullarky

v. Town of Cedar Falls (19 Iowa 27), Vol. II, p. 684; Wilson & Gustin v. Jefferson Co. (13 Iowa 181), Vol. II, p. 134.

See, also, in this connection, annotations under Rule 2 of McCord v. High (24 Iowa 336), ante. p. 193.

GRAY v. McLAUGHLIN, 26 IOWA 279

1. Evidence—Death by Wrongful Act—Action by Administrator—Vicious or Dangerous Animals—Declarations of Deceased as to Injuries. Etc.—When Admissible.—In an action by an administrator against the owner of a vicious or dangerous animal for damages for the death of his decedent caused from injuries inflicted by the animal, and where the defendant denies that the decedent's death was caused thereby, declarations of the decedent after the injuries were received as to the cause of his injuries and suffering, and, also, as to the nature and character of his suffering and illness is admissible in evidence, pp. 280, 281.

Reaffirmed and explained in Townsend v. City of Des Moines, 42 Iowa 657, 658; Armstrong v. Town of Ackley, 71 Iowa 78, 32 N. W. 181, holding that in an action for damages against a city for personal injuries caused by a defective sidewalk, the attending physician of plaintiff may testify to the former's declarations or expressions of pain and suffering—especially where these were made before the plaintiff made any demand on the city for compensation.

Reaffirmed and extended in Keyes v. City of Cedar Falls, 107 Iowa 520-522, 78 N. W. 230; Rupp v. Howard, 114 Iowa 66, 86 N. W. 38; State v. Blydenburg, 135 Iowa 274, 14 Am. & Eng. Ann. Cas., 443, 112 N. W. 638, holding further that whenever the physical or mental condition of a person is in issue, expressions or declarations of present, existing pain, whether made at the time the injury was received, or subsequently, are admissible in evidence: That such expressions and statements as to the locality of the malady or pain are exceptions to the general rule which excludes hearsay evidence, and they are admitted on the ground of necessity, as being the only means of determining whether pain or suffering is endured by another; and they are admissible regardless of the person to whom made; and whether they are simulated or not is a question for the jury.

(Note.—This Keyes case expressly overrules Ferguson v. Davis, 57 Iowa 601, 10 N. W. 906, holding the contrary.—Ed.)

Reaffirmed and varied in Welch v. Union Central Life Ins. Co., 108 Iowa 225, 231, 50 L. R. A. 774, 78 N. W. 855, holding that in an action on a life insurance policy where the defendant, insurer, tenders back the premiums paid and asks a rescission on the ground of fraud of insured in his statements as to the conditions of his health, evidence is admissible as to the declarations and statements of the insured touching the condition of his health, about the time of and before and after the issuing of the policy.

Distinguished and narrowed in McMurrin v. Rigby, 80 Iowa 326, 327, 45 N. W. 879, holding that in an action for damages for an alleged rape, where the plaintiff claims that she received certain injuries to her wrists and other portions of her body at the time the crime was committed, and where the evidence shows that she continued to work in the family of the defendant as a domestic and performing her usual labors without inconvenience or complaint or disclosure, evidence of plaintiff's mother as to bruises on plaintiff's body and declarations of the latter to her mother as to her injuries and suffering, made to the mother two weeks after the time of the alleged commission of the act complained of, is inadmissible.

(Note.—See further, McDonald v. Francher, 102 Iowa 406, 71 N. W. 427; Aryman v. Marshalltown, 90 Iowa 350, 57 N. W. 867; Blair v. Madison, 81 Iowa 313, 46 N. W. 1093; Stone v. Moore, 83 Iowa 186, 49 N. W. 76; Winter v. Central Ry. Co., 74 Iowa 450, 38 N. W. 154, some important cases sustaining and explaining, but not citing the text.—Ed.)

TAYLOR v. DISTRICT TOWNSHIP OF OTTER CREEK, 26 IOWA 281

1. Schools—Purchase of Maps, Charts and Other School Apparatus—Powers of Board of Directors of District Township—Ratification of Unauthorized Contract, What is not.—The board of directors of a district township has no authority to make a contract for the purchase of maps, charts and other school apparatus, except when authorized so to do as provided by Sec. 7 of Chap. 172, Laws of 1862, by a vote of the electors; and a contract made therefor by such board without such authority is void; and an order drawn in payment therefor is void even in the hands of an innocent holder: And the fact of the acceptance and use of the maps, charts, etc., in the schools is not a ratification of such void contract, and does not raise an implied contract on which recovery on *quantum meruit* may be had, p. 282.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Rule 1 of Taylor v. Dist. Township of Wayne (25 Iowa 447), ante. p. 283.

KING v. THARP, 26 IOWA 283

(Former Appeal, 21 Iowa 67.)

1. Execution and Judicial Sale of Several Parcels of Land in a Lump for a Gross Sum—When Will be Set Aside.—An execution or judicial sale of several parcels of land in a lump and for a gross sum, made pending an action in equity by a creditor of the judgment debtor to set aside the latter thereto as fraudulent, and to subject the land to the creditor's demand, will be set aside at the instance

of the creditor, and a new execution and sale will be ordered, p. 287.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under *Bradford v. Limpus* (13 Iowa 424), Vol. II, p. 167.

CHAPMAN v. COATS, 26 IOWA 288

1. Judgment Lien on Land—Prior Unrecorded Deed or Mortgage—Recording of Before Sale Under Execution—Rights of Execution Purchaser.—A judgment lien on land is inferior to the rights of the grantee or mortgagee of a prior unrecorded deed or mortgage; and if the prior instrument be recorded before sale of the land under an execution to satisfy the judgment, the purchaser thereat takes subject to the rights of the prior grantee or mortgagee, p. 291.

Reaffirmed in *Albia State Bank v. Smith*, 141 Iowa 257, 258, 119 N. W. 609, holding that a judgment lien attaches to the judgment debtor's interest, legal or equitable, in land, but not to the naked legal title.

Reaffirmed and extended in *Fletcher v. Kelley*, 88 Iowa 492, 21 L. R. A. 347, 55 N. W. 477, holding further that an unrecorded mortgage on land is prior to the subsequent lien of a mechanic or materialman, and that the latter must, at his peril, take notice of all liens and incumbrances, except as provided in the statute relating to his lien.

Reaffirmed and qualified in *Koch v. West*, 118 Iowa 472, 96 Am. St. Rep. 394, 92 N. W. 664, holding that where there is a sale of land under a judgment to a person other than the execution plaintiff and for value paid and without notice of a prior unrecorded deed or mortgage to or on the land, such purchaser takes it free from any right or claim of the prior grantee or mortgagee.

Cross references. See further on this question, annotations under Rules 2 & 3 of *Caskell v. Case* (18 Iowa 147), Vol. II, p. 600; Rule 1 of *Vannice v. Bergen* (16 Iowa 555), Vol. II, p. 472; *Welton v. Tizzard* (15 Iowa 495), Vol. II, p. 371; *SeEVERS v. Delashmutt* (11 Iowa 174), Vol. I, p. 797; *Norton et al, v. Williams* (9 Iowa 528), Vol. I, p. 620.

STATE v. HULL, 26 IOWA 292

1. Trial of Indictment—Minutes of Testimony of Witnesses Upon Preliminary Examination—Not Conclusive on State—Impeachment or Contradiction by.—The minutes of testimony (not read over to or signed by the witnesses) taken by a justice of the peace at a preliminary examination in a criminal prosecution, and used as evidence by accused upon the trial of the indictment, are not conclusive upon the State as to what the witnesses testified to upon the preliminary examination.

But the question of the admissibility, when objected to, as original or as impeaching evidence, is not herein determined, pp. 296, 297.

Cited in State v. Collins, 32 Iowa 40, the court holding that a witness cannot be impeached by reason of his having made a previous contradictory statement, without having his attention specifically called to it and having an opportunity to explain it while he is being examined; and that in the question or questions to the witness, the time, place and person involved in the contradictory statement, must be given.

Cited in State v. Hayden, 45 Iowa 14, the court holding that the minutes of an examining trial, or of the grand jury, are inadmissible to contradict or impeach a witness.

Cross references. See further on this question, annotations under Boyd v. First Nat'l Bank of Oskaloosa (25 Iowa 255), ante. p. 262; Rule 2 of Samuels v. Griffith (13 Iowa 103), Vol. II, p. 125.

See, also, in this connection, annotations under Rule 2 of State v. Bowers (17 Iowa 46), Vol. II, p. 490.

MCLAREN v. HALL, 26 IOWA 297

1. Attachment—Motion to Discharge—Causes for Which Allowed—Sufficiency of Evidence or Record to Sustain Motion.—Under Sec. 3239 of the Code of 1860, a motion may be made to discharge the attachment or any part thereof, at any time before trial, for insufficiency of statement of cause thereof, or for other cause making it apparent of record that the writ should not have issued, or should not have been levied on all or on some part of the property: But in such case and in order to authorize the discharge of an attachment upon such motion, the affidavits or other evidence in support thereof, or the record, must make it clear and entirely satisfactory that the motion should be sustained for one of the causes above set out, p. 300.

Reaffirmed in Cramer v. White, 29 Iowa 338.

Reaffirmed in Cox v. Allen, 91 Iowa 467, 59 N. W. 337, under Sec. 3018 of the Code of 1873.

Reaffirmed and explained in Tidrick v. Sulgrove, 38 Iowa 340, 341, under Sec. 3018 of the Code of 1873, corresponding to the section of the text: But holding, however, that such section has no application to a third person who claims to own or to have an interest in attached property, his rights being governed by Sec. 3016 of the Code of 1873.

Reaffirmed and varied in Gordon v. Bucknell, 38 Iowa 439, holding that upon a motion to quash a writ of replevin on the ground that the plaintiff through fraud and falsehood had obtained possession of the property and brought it from another state into the county where the action was instituted, so that it would be within the jurisdiction

of the court, the evidence, in order to authorize the court to set aside its process or quash the writ, ought to be clear and satisfactory.

Cited in Clark v. Tull, 113 Iowa 145, 84 N. W. 1031, the court holding that Sec. 3929 of the Code of 1897 provides only for the discharge of attached property on motion before trial; and that after a final adjudication establishing a lien and ordering a special execution and sale thereunder, the property cannot be discharged on a motion, particularly where it is based upon facts not apparent of record before.

And see 152 Iowa 420, not yet published.

Unreported citation, 83 N. W. 806.

2. Account—Payment of by Execution of Note—When Note Operates as Satisfaction or Payment of Pre-Existing Account.—The execution and delivery by a debtor of a note for the amount of an account due his creditor, does not operate as a satisfaction of or prevent action being subsequently maintained on the account, unless the note is received by the creditor in *payment or satisfaction* thereof, p. 301.

Reaffirmed and explained in Farwell & Co. v. Salpaugh, 32 Iowa 585, holding that the giving and accepting of an order, bill of exchange, or promissory note for a prior indebtedness will not be regarded as payment thereof, unless there be an express agreement between the parties to that effect: But that where a creditor accepts an order on a third person in payment of his debt, it extinguishes it, upon the order being accepted by the third person.

Reaffirmed and explained in Edwards & Beardsley v. Trulock, 37 Iowa 249; Farwell v. Grier, 38 Iowa 87; Bank of Monroe v. Gifford, 79 Iowa 308, 44 N. W. 561, holding that the general rule is, that the giving of a bill of exchange, or a promissory note for goods sold, or for an existing contract, is not to be regarded as payment of the indebtedness, unless there is an express agreement to that effect.

Reaffirmed and explained in Shadbolt & Boyd v. Shaw, 40 Iowa 586, holding that a promissory note given upon an existing indebtedness will not operate as a payment thereof, unless there is a special agreement to that effect, or it is received in satisfaction.

Reaffirmed and extended in Huse v. McDaniel, 33 Iowa 408, 409, Hunt & Co. v. Higman, 70 Iowa 410, 411, 30 N. W. 771, holding further that the transfer of a note or bill of a third party on account of an existing debt, in the absence of an agreement that it shall be taken in absolute payment, operates only as a conditional payment, and does not defeat recovery upon the original indebtedness in case of the non-payment of the paper of the third party.

Reaffirmed and extended in Deen, Adm'r, v. Ridgeway, 82 Iowa 759 (abstract), 48 N. W. 925, holding further that a note given for

interest does not operate in payment thereof, in the absence of an agreement to that effect.

Reaffirmed and qualified in Griffin v. Erskine and Andrews, receivers, 131 Iowa 451, 455, 9 Am. & Eng. Ann. Cas., 1193, 109 N. W. 16, holding that where a bank to whom a note is sent for collection receives a check or draft in payment thereof, and such check or draft is thereafter paid, it constitutes a payment of the note.

And see 148 Iowa 11, not yet published.

Unreported citation, 126 N. W. 909.

Cross references. See further on this question, annotations under Kephart v. Butcher (17 Iowa 240), Vol. II, p. 522; Graydon, Swanwick & Co. v. Patterson & Co. (13 Iowa 256), Vol. II, p. 146; Gower v. Holloway (13 Iowa 154), Vol. II, p. 131.

3. Attachment—Defense—Denial of Grounds as, Not Allowed.
—In an attachment action the defendant cannot—under Sec. 3238 of the Code of 1860—raise an issue by way of defense and for trial in the main action, upon the grounds stated in the petition for the attachment, p. 301.

Reaffirmed in Sturman v. Stone, 31 Iowa 118.

4. Husband and Wife—Principal and Agent—Husband May Contract as Agent for Wife—Ratification by Wife—Mechanic or Materialman's Lien on Land of Wife under Husband's Contract.
A husband may contract in relation to his wife's property and as her agent; but in order to bind her thereby it must be shown that the husband acted as agent under previously conferred authority, or that she subsequently ratified his acts, with knowledge thereof, either express or implied; and the ratification must be shown by those unmistakable acts or declarations which evince a knowledge of the contract by which she is sought to be bound, and an intention to adopt or ratify it as her own.

And this rule applies where a mechanic or materialman seeks to enforce a lien on the wife's land for labor performed or materials furnished under a contract with her husband, pp. 305, 306.

Reaffirmed and explained in Miller v. Hollingsworth, 33 Iowa 227, 228; Price & Hornby v. Seydel, 46 Iowa 697, 698, holding that the fact of a husband's agency cannot be inferred from the marital relation; but that some previous appointment, or general holding out to the public as agent, or subsequent adoption or ratification of his acts is essential in order to hold the wife bound thereby.

Reaffirmed, explained and extended in Saunders v. King, 119 Iowa 296, 297, 93 N. W. 274, holding that authority to a husband to sell his wife's farm is not to be inferred from the facts that she had permitted her husband to manage the farm, dispose of the products thereof, and handle the proceeds as he saw fit, depositing the latter in bank in his own name.

Reaffirmed and qualified in Miller v. Hollingsworth, 36 Iowa 165, 166, holding that equity will enforce a lien on real estate of a wife for the amount of lumber and other materials purchased by her husband and used in the improvement of such realty, with the full knowledge and acquiescence of the wife, when it is further shown in the action that the materials and lumber were not furnished on the credit of the husband alone.

Cited in Britt v. Gordon, 132 Iowa 435, 11 Am. & Eng. Ann. Cas., 407, 108 N. W. 321, the court holding that there can be no ratification without the party sought to be bound thereby had full knowledge of all the facts at the time he is claimed to have ratified the unauthorized act.

Distinguished and narrowed in Furman v. Ch., R. I. & P. Ry. Co., 62 Iowa 398, 399, 17 N. W. 599, holding that in an action against a common carrier for failure to deliver household goods which were jointly used by both husband and wife, and where the husband took the bill of lading in his own name, the agency of the husband so to do may be inferred from slighter circumstances than would be necessary to establish an agency on the part of a stranger.

And see 146 Iowa 495, 125 N. W. 179.

DODDS v. DODDS, 26 IOWA 311

1. Descent and Distribution—Homestead—Right of Surviving Consort.—Under the Code of 1860, the surviving husband or wife has the right to occupy homestead owned by the decedent consort, free from interference by the heirs, p. 312.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Nicholas v. Purcell (21 Iowa 265), Vol. II, p. 903.

2. Descent and Distribution—Rights of Widow Whose Husband Dies without Issue.—Upon the death of a husband leaving no issue, the widow is entitled—under the Code of 1860—to one-half of the decedent's real estate other than the homestead, p. 312.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Rule 2 of Burns v. Keas (21 Iowa 257), Vol. II, p. 900.

RHODES v. STOUT, ADMINISTRATOR, 26 IOWA 313

1. Decedent's Estate—Administrator Takes Personal Estate and Alone Has Right to Maintain Action Concerning.—The administrator of a decedent takes the personal estate, and he *alone* has the right to maintain an action concerning or involving it, p. 315.

Reaffirmed in Haynes v. Harris, 33 Iowa 518.

ROBERTS, ASSIGNEE, v. AUSTIN, CORBIN & Co., 26 IOWA 315, 96 AM.
DEC. 146

(Later Appeal, 28 Iowa 355.)

1. Negotiable Instruments—Bills of Exchange—Checks and Drafts—When Foreign Draft Treated as Check.—A draft drawn by a banker of this State on a foreign banker with whom the former has money on deposit to meet his drafts is to be treated as a banker's check and not a foreign bill of exchange, pp. 321, 322.

Reaffirmed in Northwestern Coal Co. v. Bowman & Co., 69 Iowa 152, 28 N. W. 497.

2. Negotiable Instruments—Banker's Check—Draft Drawn by One Banker on Another Banker Having Funds on Deposit—Rights of Holder—Subsequent Assignment for Benefit of Creditors of Drawer—Rights of Assignee.—Where a banker draws a draft on another banker who has funds on deposit to cover it, the draft will be treated as a check; and a holder thereof may maintain an action thereon against the drawee who wrongfully refuses to pay it, although it has not been accepted.

The subsequent assignment for the benefit of creditors of the drawer of the draft gives his assignee no right to the fund on deposit with the drawee which will interfere with the rights of such holder, pp. 323-328.

Reaffirmed and explained in Schollmier v. Schoendelen, 78 Iowa 430, 431, 16 Am. St. Rep. 455, 43 N. W. 283, holding that a check or order drawn against funds operates as an equitable assignment of them to the amount of the order, and that notice of the check or the order given to the holder of the funds will be sufficient to hold them, even without an acceptance.

Reaffirmed and explained as to first paragraph in Kuhnes v. Cahill, 128 Iowa 596, 597, 104 N. W. 1026, holding that the giving of a check drawn upon a general deposit fund in a bank amounts to an equitable assignment *pro tanto* of such fund; and that the drawee has priority over a creditor of the drawer subsequently attaching the fund.

Reaffirmed and extended as to first paragraph in Percival v. Strathman, 112 Iowa 748, 84 N. W. 930, holding that where the drawee in a check refuses payment of part thereof, the payee may sue and recover the amount withheld: And that this rule applies where the drawee applies part of the amount of a check to the payment of a debt due by the agent of the payee, upon the agent presenting the check for payment.

Reaffirmed and extended as to first paragraph in Bloom v. Winthrop State Bank, 121 Iowa 103, 96 N. W. 734, holding further that the holder of an unaccepted check may maintain an action thereon against the drawee or bank in his own name.

Cited in May v. Jones, 87 Iowa 198, 199, 54 N. W. 234, the court holding that a check transfers to the payee a right to recover its amount of the bank on which it is drawn, if the drawer have a sufficient deposit when it is presented, and that right vests when the check is delivered: And that when a check is drawn and delivered as a gift, and the delivery is coupled with an intent to transfer a present interest in the money represented by the check and no revocation is attempted, the intent of the donor should be given effect, and the transaction be held to transfer a present interest, and a right to the payment of the check after the death of the drawer as well as before.

Cited in State v. Gibson, 132 Iowa 56, 106 N. W. 271, the case turning on other points.

Distinguished in Poole, Gilliam & Co. v. Carhart, 71 Iowa 38, 39, 32 N. W. 16, holding that the mere drawing and delivery of an order for the payment of money does not until accepted by the drawee, confer the right of action thereon against the payee by the drawee.

Distinguished and narrowed in Thomas and Muir v. Exchange Bank of Angus, 99 Iowa 208, 209, 35 L. R. A. 379, 68 N. W. 781, holding that where a banker draws a draft on another banker who has funds of the former on deposit, and before the drawee has notice of the issuance thereof, the drawer becomes insolvent, the drawee may apply the fund on deposit to the payment of a note it holds against the drawer, to the exclusion of the rights of the holder of the draft, and although he be thereby postponed or defeated.

And see 150 Iowa 361, 130 N. W. 390.

3. Contracts—Contract or Promise Made by One for Benefit of Another—Party for Whose Benefit It was Made May Sue.—In cases of simple contract, if one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration did not move from him, p. 324.

Special cross reference. For cases citing, sustaining and explaining the text, and many others on the question, see annotations under Rice v. Savery (22 Iowa 470), ante. p. 58.

4. Assignment for Benefit of Creditors—Rights of Assignee.—Upon an assignment for the benefit of creditors, the assignee stands in the place of and has only the rights of his assignor or debtor, p. 327.

Reaffirmed in Warner v. Jameson, 52 Iowa 72, 2 N. W. 953; Van Sandt v. Dowses & Co., 63 Iowa 596, 50 Am. Rep. 759, 19 N. W. 670; Prouty v. Clark, 73 Iowa 57, 34 N. W. 615; Devin v. Eagleson, 79 Iowa 376, 44 N. W. 547; In re Assignment of Wise, 121 Iowa 361, 96 N. W. 872.

Reaffirmed and extended in Butson v. Home Sav. & Trust Co., 129 Iowa 377, 378, 113 Am. St. Rep. 463, 4 L. R. A. (New Series) 98, 105 N. W. 648, holding that a receiver, or assignee in insolvency

proceedings takes the debtor's estate subject to all the outstanding rights and equities which attached to it in the hands of the debtor himself.

Distinguished in Gimble, Florshine & Co. v. Ferguson, 58 Iowa 415, 416, 10 N. W. 790, holding that where, after the execution of a chattel mortgage, the mortgagor executes a general assignment for the benefit of his creditors, the latter instrument passes title to the assignee to the overplus of the proceeds of the mortgaged property, after payment of the mortgage debt, and free from claims of a subsequent attaching or garnishing creditor of the debtor.

And see 150 Iowa 700, 130 N. W. 802.

Unreported citation, 130 N. W. 802.

5. Appeal to Supreme Court—Practice—Change or Revocation of Order after Reversal—When Not Allowed.—The Supreme Court will not after a cause is reversed and remanded to the court below, and after the expiration of the time allowed for filing a petition for a rehearing and at a succeeding term of the higher court, change or revoke the order on which rests the rights of the party who was successful upon the appeal, pp. 330, 331.

Reaffirmed in Miller v. Rosebrook, 144 Iowa 195, 122 N. W. 837.

EMERICK v. CLEMENS, 26 IOWA 332

1. Contracts—Construction of—All Parts and Language to be Given Force and Validity.—All parts of a contract will be construed in such a way as to give force and validity to all of them, and to all of the language used, where this is possible, p. 335.

Reaffirmed in McArthur v. Board, 119 Iowa 565, 93 N. W. 581.

Reaffirmed and extended in Heiple v. Reinhart, 100 Iowa 528, 69 N. W. 872, holding further that the intent of the parties to a contract is ordinarily determined by the language they use, and, if this is definite, certain and complete, it must control.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

GAINOR v. GAINOR, 26 IOWA 337

1. Fraud—Marriage and Marital Rights—Voluntary Conveyance by Consort before Marriage—When Fraudulent as to Other.—A voluntary settlement or conveyance of property by a wife or husband, prior to marriage, will be held fraudulent as to the marital rights of the one to whom she or he afterward be joined in matrimony, only when made in contemplation of marriage, and pending a treaty of marriage between the parties, p. 340.

Reaffirmed in Beere v. Beere, 79 Iowa 558, 559, 44 N. W. 811.

Reaffirmed and narrowed in Hamilton v. Smith, 57 Iowa 18, 19, 42 Am. Rep. 39, 10 N. W. 278, holding that where a father upon the

eve of a second marriage makes a voluntary conveyance of certain realty to the children of his first marriage, the instrument will not be declared void as a fraud on the rights of the second wife, although it was executed without the consent or knowledge of the second wife, where an actual fraudulent intent on the part of the grantor is not shown, or it is not shown that imposition had been practiced on the second wife prior to the marriage, by representations made by the husband (grantor) respecting his property.

Partially overruled in Beechley v. Beechley, 134 Iowa 78, 79, 120 Am. St. Rep. 412, 9 L. R. A. (New Series) 955, 13 Am. & Eng. Ann. Cas., 101, 108 N. W. 764, holding that in so far as the rule of the text limits the application of the rule in this class of cases to only cases where negotiations looking toward a marriage, or where an engagement exists, it is overruled: And that if a conveyance is made in contemplation of marriage and with intent to deprive the spouse of the marital rights which she would otherwise acquire, it is enough to invalidate the conveyance so far as it affects such rights: But that if there be no treaty of marriage at the time of the conveyance, it is a strong circumstance tending to disprove fraud.

STATE v. SQUIRES, 26 IOWA 340

1. Constitutional Law—Local and Special Laws—Curative Acts—School Districts.—Although Sec. 30, Art. 3 of the Constitution of 1857 forbids the General Assembly from passing local or special laws, yet it may enact a law legalizing the defective organization of an independent school district, and legalizing the acts of the *de facto* officers thereof; and the fact that such law is made to apply to only one district is no objection to its validity or constitutionality, where a general law would not be applicable, pp. 343, 345, 348.

Reaffirmed in Bennett v. Fisher, 26 Iowa 500, upholding constitutionality of an Act of 1868 (p. 40 of Laws of that year) legalizing certain illegal acts in the prior establishment of county roads.

Reaffirmed in Independent Dist. of Union v. Independent Dist. of Cedar Rapids, 62 Iowa 618, 619, 17 N. W. 896, upholding constitutionality of Chap. 120 of the 19th General Assembly (1882) legalizing the acts of the county superintendent in detaching certain territory from one and attaching it to another independent school district.

Reaffirmed in Ch. R. I. & P. Ry. Co. v. Avoca, 99 Iowa 561-564, 68 N. W. 883, upholding the constitutionality of an Act of the 25th General Assembly (1894) legalizing acts of the board of directors of the independent school district of Avoca in the levying of taxes for school purposes for certain years.

Reaffirmed and explained in Palmer v. Howard County, 45 Iowa 641; Swartz v. Andrews, 137 Iowa 266, 114 N. W. 890, holding that a curative statute, retrospective in character is unconstitutional only in so far as it interferes with vested rights; and that the Act of 1858

(Chap. 30, Laws of that year), curing defects in acknowledgments to deeds before its taking effect, is not unconstitutional as impairing the obligation of contracts, but is invalid as affecting rights vested before its passage.

Reaffirmed and explained in *Tuttle v. Polk & Hubbell*, 84 Iowa 15, 16, 50 N. W. 39, holding that the General Assembly has power to cure defects or irregularities in the proceedings of officers or boards, where it has the power to dispense with such proceedings by prior statute—The court upholding the constitutionality of the Act of April 16, 1888, as to cities of the first class and cities organized by special charter, curing defects or irregularities in relation to a special tax or assessment by subsequent ordinance and proceedings thereunder; and holding that such ordinance or proceedings applies to contracts for such special tax or assessment for payments made under such irregular or defective proceedings.

Reaffirmed and explained in *City of Clinton v. Walliker*, 98 Iowa 659, 660, 68 N. W. 433, holding that the general Assembly has power to pass an Act curing and legalizing the defects or irregularities in the proceedings, ordinances and resolutions of a city relative to paving its streets, assessing and levying taxes therefor, and appropriating funds for the building of a city hall built before the taking effect of the curative act; and that such Act applies to a claim for erecting a pavement under such cured proceedings, ordinances, etc., on which an action is pending at the time of the passage of the curative Act—the court upholding as constitutional the Act of March 23, 1894, in favor of the City of Clinton and for such purposes.

Reaffirmed and explained in *Ch. R. I. & P. Ry. Co. v. Independent Dist. of Avoca*, 99 Iowa 562, 68 N. W. 882, holding—as does the present case—that when the General Assembly has power to authorize an act to be done, it may, by a retrospective Act, legalize and declare valid any informality or irregularity in the exercise of the power thus conferred.

Reaffirmed and explained in *Witter v. Board of Supervisors of Polk County*, 112 Iowa 391, 83 N. W. 1045, holding—as does the present case in argument—that the rule in regard to curative statutes is that if the thing omitted or failed to be done, and which constitutes the defect sought to be removed or made harmless is something which the Legislature might have dispensed with by previous statute, it may do so by a subsequent one: That if the irregularity consists in doing some act or doing it in the mode which the Legislature might have made immaterial by a prior law, it may do so by a subsequent one.

Reaffirmed and explained in *McSureley v. McGrew*, 140 Iowa 172-175, 118 N. W. 420, holding—as does the present case in argument—that the Legislature may by statute, cure any defects or irregularities in the acts or proceedings of an officer, or municipal body, when it could have dispensed with such proceedings, or have made the manner

of doing them immaterial, or have authorized them, as the case may be, by previous statute.

Reaffirmed and extended in Iowa R. R. Land Co. v. Soper, 39 Iowa 117-119, holding further that a statute legalizing the prior levy and assessment of taxes, and prescribing the manner in which property is to be sold therefor, is constitutional as to all sales for taxes and other proceedings thereunder made after its taking effect.

Cited in Iowa Sav. & Loan Ass'n v. Heidt, 107 Iowa 304, 70 Am. St. Rep. 197, 43 L. R. A. 689, 77 N. W. 1053, the court upholding the constitutionality of Sec. 1898 of the Code of 1897, as amended by Chap. 48, Acts of Twenty-seventh General Assembly (1898) in relation to building and loan associations and as to their contracts which are not usurious, and making the law applicable to existing contracts as therein provided.

Cross references. See Rule 3 hereof, in this connection.. See further on this question, annotations and cross references under Rule 1 of Town of McGregor v. Baylies (19 Iowa 43), Vol. II, p. 689; Rule 3 of Boardman v. Beckwith (18 Iowa 292), Vol. II, p. 632.

2. Constitutional Law—Ex Post Facto Law Defined—To What Applies.—An *ex post facto* law is one that makes an act criminal which was innocent when done; or, if it was criminal when done, aggravates the crime or offense, or increases the punishment, or reduces the measure of proof. Such laws are prohibited by the Constitution of the United States, p. 346.

Reaffirmed in State v. Dale, 110 Iowa 219, 81 N. W. 454.

Reaffirmed, explained and qualified in Polk County v. Hierb, 37 Iowa 368, holding that an *ex post facto* law is a retroactive criminal law, which makes an act punishable in a mode or measure in which it was not punishable when the act was committed, unless it be to diminish the punishment.

Cited in State v. Reyelts, 74 Iowa 504 (dissenting opinion), 38 N. W. 379, the majority court opinion turning upon another point.

And see 147 Iowa 531, 1912 B. Am. & Eng. Ann. Cas. 691, 126 N. W. 460.

3. Constitutional Law—Retrospective or Retroactive Laws Not Forbidden—When Held Void or Inoperative—Vested Rights—Construction of Statutes.—The enactment of retrospective or retroactive statutes as distinguished from *ex post facto* laws, is not prohibited either by the State or National constitutions; and in the absence of a constitutional inhibition the Legislature may pass such laws; but where they interfere with vested rights they will be declared void or inoperative to that extent.

Courts will construe all statutes to be prospective only, except where the Legislature expressly declares or otherwise shows a clear intent that the statute shall have a retrospective or retroactive operation or effect, p. 347.

Reaffirmed in Bennett v. Fisher, 26 Iowa 500; Iowa R. R. Land Co. v. Soper, 39 Iowa 117; Ch. R. I. & P. Ry. Co. v. Avoca, 99 Iowa 561, 68 N. W. 882; Galusha, treasurer, v. Wendt, Ex'x, 114 Iowa 602, 603, 87 N. W. 514; Swartz v. Andrews, 137 Iowa 266, 114 N. W. 890.

Reaffirmed as to second paragraph in Payne v. C. R. I. & P. R. R. Co., 44 Iowa 238; Starr v. City of Burlington, 45 Iowa 92.

Reaffirmed and explained as to first paragraph in Tilton v. Swift & Co., 40 Iowa 79-81, holding that retrospective laws which cure defects in acts done, or which authorize the exercise of powers which operate retrospectively are valid, if they do not interfere with vested rights, and if the Legislature had the right to confer the power and the act would have been valid under a prior enactment: That legislation operating retrospectively and rendering acts effective as between the parties thereto, are valid—Holding further that the Legislature has power to change the remedy for the enforcement of a right, add a new remedy, or grant a remedy for the enforcement of a right, such law to operate retrospectively, provided it does not interfere with vested rights.

Reaffirmed and explained as to first paragraph in Ross v. Board of Supervisors of Wright County, 128 Iowa 432, 1 L. R. A. (New Series) 431, 104 N. W. 508, holding that the Legislature may by amendment, cure a constitutional defect in a statute the main purpose of which is within the scope of legislative power and give such amendment retroactive effect upon cases already begun and pending—the court upholding constitutionality of Chap. 67, Laws of 30th General Assembly (1904).

Reaffirmed and extended in Slocum v. Fayette County, 61 Iowa 170, 171, 16 N. W. 61, holding further that the General Assembly may pass laws affecting the remedy, and making it apply to pending actions: And holding, therefore, that Sec. 202 of McClain's Code limiting the right to appeal from the action of a township board of equalization to sixty days after the adjournment of the board, applies to an appeal therefrom which had accrued at the time of the taking effect of the section.

Reaffirmed and extended as to second paragraph in City of Davenport v. D. & St. P. R. R. Co., 37 Iowa 625, holding further that unless otherwise clearly shown on its face, a statute only applies from its taking effect; and the words "heretofore," "hereafter" and "prior to the passage," etc., in a statute relate to the time of its taking effect and not to its passage.

Cited in McCready v. Sexton & Son, 29 Iowa 394, 4 Am. Rep. 214, the case turning on other questions.

Cross references. See rule 1 hereof in this connection. See further on this question, annotations under Rule 3 of Boardman v. Beckwith (18 Iowa 292), Vol. II, p. 632; Bartruff v. Remey (15

Iowa 257), Vol. II, p. 339; Rule 2 of *Brinton v. Seevers* (12 Iowa 389), Vol. II, p. 64.

PHILLIPS v. STARR & Co., 26 IOWA 349

1. Evidence—Expert Testimony—Nature of Questions to be Propounded to Expert—Improper Conclusions of Such Witness.—In the examination of an expert witness, certain facts may be assumed as true and he be asked to state his scientific opinion derived therefrom; but such a witness cannot undertake to determine what is shown by the evidence, and give his opinion thereupon, p. 351.

Special cross reference. For cases citing, sustaining and explaining the text, and others, see annotations under Rule 3 of *State v. Felter* (25 Iowa 67), ante. p. 233.

2. Contracts—Express Stipulation in Not Controlled by Custom.—An express stipulation in a contract will not be controlled or varied by a custom to the contrary, p. 351.

Reaffirmed and explained in *Randolph v. Halden*, 44 Iowa 329, 330, holding that a contract cannot be controlled by a custom which the parties have expressly excluded, or which they have excluded by necessary implication, as by providing that a thing which custom affects shall be done in a different way.

Reaffirmed and explained in *Steele v. Andrews & Sons*, 144 Iowa 364, 365, 121 N. W. 19; *Healy v. Tyler*, 150 Iowa 172, 129 N. W. 803, holding that customs are never paramount to the contract as expressed by the parties; but that on the contrary they are subordinate to the contract, and can never be permitted to contradict it, nor to affect the rights of the parties as fixed by the plain terms of the contract.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

3. Appeal—Bill of Exceptions—Instructions or Charge of Court—How Brought for Review upon Appeal.—Where, upon the trial of a civil action by jury, the charge of the court and instructions given or refused, are marked by the trial judge "given" or "refused" on the margin thereof, and the exception of a party is noted on the margin of the parts of the charge, or each of the instructions excepted to, it is sufficient—under Secs. 3054 and 3055 of the Code of 1860—to authorize a review upon appeal, although it is the better practice to embody or identify instructions given or refused and the charge of the court in a bill of exceptions, p. 352.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under *Cadwallader & Co. v. Blair & Van Norstrand* (18 Iowa 420), Vol. II, p. 660.

HOSMER, ADMINISTRATOR, v. BURKE, 26 IOWA 353

1. Evidence—Party Incompetent to Testify to Certain Facts Where Adverse Party Is Executor or Administrator.—Under Sec. 3982 of the Code of 1860, a party is incompetent to testify to facts transpiring before the death of a decedent where the latter's executor or administrator is the adverse party, p. 357.

Cited in Shafer v. Dean, 29 Iowa 145, the court holding that the wife of a party may testify as to facts transpiring during the lifetime of a decedent, where the adverse party is an executor.

2. Partnership—Liability of Members Individually on Firm's Note.—Under Sec. 2764 of the Code of 1860, an action may be maintained against any member of a partnership upon a promissory note executed by the firm, p. 356.

Reaffirmed and explained in Allen v. Maddox, 40 Iowa 125, 126, holding that persons jointly bound, either by contract or relationship (as partners, etc.) may be severally sued; or such a demand may be the subject of set-off against any one so bound.

ORMAN v. ORMAN, 26 IOWA 361

1. Decedent's Estate—Homestead—Rights of Widow and Heirs.—Upon the death of a husband his widow is—under the Code of 1860—entitled to occupy the homestead which was owned by him; but if she permanently abandons it, she forfeits her right thereto, and becomes a tenant in common with the heirs, p. 362.

Special cross reference. For cases citing and sustaining the text, and many others in this connection, see annotations under Nicholas v. Purcell (21 Iowa 265), Vol. II, p. 903.

HUNT v. CHICAGO & NORTHWESTERN R. R. Co., 26 IOWA 363

1. Appeal—Instructions Given Below Not Prejudicial Not Cause for Reversal.—Although the trial court gives instructions which are technically erroneous, yet where it appears from the record upon appeal that they did not prejudice the rights of the party complaining, the judgment will not be reversed by reason thereof, p. 365, 366.

Reaffirmed and explained in First Nat'l Bank of Fort Dodge v. Breese, Whitlock & Co., 39 Iowa 645, holding that the giving of an erroneous instruction which, under the testimony, could work no prejudice to the party complaining, will not be regarded as reversible error.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

2. Railroads—Liability of Railroad Company for Personal Injuries to Employee Received by Negligence of Fellow Servant—Care

Required by Company.—Although a railroad company is liable in damages under Chap. 169, Sec. 7, Laws of 1862, for personal injuries to an employe occasioned by the neglect or mismanagement of a fellow servant or employe in the operation of a train, yet the company is only liable in such a case for the want of ordinary care or diligence of the fellow servant, pp. 367-371.

Reaffirmed in Kroy v. Ch. R. I. & P. R. R. Co., 32 Iowa 360, 361; Hamilton v. Des Moines Valley R. R. Co., 36 Iowa 39.

Reaffirmed and explained in Akeson v. Ch. B. & Q. Ry. Co., 106 Iowa 56, 57, 75 N. W. 676, holding that Sec. 7 of Chap. 169, Acts of 1862 (Act of the text), is constitutional: And that a railroad company is liable in damages thereunder for want of ordinary care in one fellow servant resulting in personal injury to another fellow servant; and that the Act applies to all persons employed by a railroad company whose employment is connected with the operation of a railway train, but not to persons otherwise employed by the company who are not exposed to the hazards of the operation of trains.

Cited in Sandham v. C. R. I. & P. R. R. Co., 38 Iowa 90, the court holding—as does the present case in argument—that not ordinary, but extraordinary diligence is required of a railroad company as to passengers, and it is responsible in such a case for the utmost care and watchfulness, and is answerable in damages for personal injuries occasioned by the smallest negligence.

Cited in Major v. B. C. R. & N. Ry. Co., 115 Iowa 314, 88 N. W. 817, the court holding that an action for damages for the death of an employe of a railroad company caused by the negligence of a fellow servant in the operation of a train, can only be brought by the personal representative of decedent.

Cross references. See further on this question, annotations under Rules 1 & 2 of McAunich v. M. & M. R. R. Co. (20 Iowa 338), Vol. II, p. 823.

3. Negligence—Contributory Negligence.—No one can recover for an injury of which his own negligence was in whole or in part the proximate cause, pp. 366, 367.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Rule 5 of Donaldson et al, Adm'rs, v. M. & M. R. R. Co. (18 Iowa 280), Vol. II, p. 627.

Cross references. See further on this question, annotations under Rule 3 of McAunich v. M. & M. R. R. Co. (20 Iowa 338), Vol. II, p. 823.

4. Negligence—Damages—Evidence—Person Injured May Show His Dependence upon His Labor for Support.—In an action by employe of a railroad company for damages for personal injuries occasioned by the negligence of the company's agents or employes in the operation of its train, the plaintiff may prove, as bearing upon

the amount of damages, and where the injuries received will in whole or in part prevent his laboring, that he has no means of support and is dependent upon his labor therefor, pp. 372, 373.

Reaffirmed in *Stafford v. City of Oskaloosa*, 64 Iowa 258, 259, 20 N. W. 178, in an action against a city for damages for personal injuries occasioned by its negligently permitting an obstruction to remain in a street.

Distinguished in *Perrine v. Winter*, 73 Iowa 647, 648, 35 N. W. 680, holding that in an action of slander evidence of the poverty of, or humble occupation of the plaintiff is inadmissible.

(Note.—See further on this question, *Simonson v. C. R. I. & P. R. R. Co.*, 49 Iowa 87; *Moore v. Central R. R. Co.*, 47 Iowa 689, sustaining, but not citing the text.—Ed.

5. Negligence—Evidence—Damages—Defendant's Ability to Pay or His Financial Condition Inadmissible.—In an action for damages for personal injuries occasioned by the negligence of the agents or servants of a railroad company in the management or operation of its train, the defendant's financial condition or ability to pay damages is inadmissible in evidence to increase damages; especially in the absence of proof entitling plaintiff to punitive or exemplary damages, pp. 373, 374.

Reaffirmed and extended in *Guengerech v. Smith*, 34 Iowa 348, 349 (cited in dissenting opinion, 350), holding further that except in cases of slander and libel, and breach of promise to marry, the pecuniary ability of defendant is not receivable in evidence in an action of damages (in this case for assault and battery), even under circumstances entitling plaintiff to recover exemplary damages, such as insult, cruelty, vindictiveness or malice.

Distinguished in *Perrine v. Winter*, 73 Iowa 647, 648, 35 N. W. 680, holding that in an action of slander, evidence of the financial condition of the defendant is admissible for plaintiff.

Cross reference. "Slander and Libel an exception to Rule"—See annotations under Rule 3 of *Karney v. Paisley* (13 Iowa 89), Vol. II, p. 123.

McEWEN v. McEWEN, 26 IOWA 375

1. Divorce and Alimony—Original Notice in Action for Need Not State Claim for Alimony.—In an action of a wife for divorce where the petition claims and prays for alimony, the original notice need not—under Secs. 2812 and 2537 of the Code of 1860—state the claim for alimony.

Under Sec. 2537 of the Code of 1860, when a divorce is decreed the court may make such order in relation to the children and property of the parties, and the maintenance of the wife as shall be right and proper, p. 376.

Reaffirmed and explained in *Twing v. O'Meara*, 59 Iowa 331, 13 N. W. 323, holding that —under Sec. 2229 of the Code of 1873, cor-

responding to Sec. 2537 of the Code of 1860—alimony is an incident to divorce, and can only follow it, and the statute authorizing service of notice by publication in an action for divorce, cannot fairly be construed to limit the power of the court, when service is thus made, to simply granting a divorce: And that the court has jurisdiction of the cause, and may make all proper orders as to alimony, the custody of children, etc., which are incident to the divorce; but that its orders as to alimony, when the service is by publication, will be binding only so far as the subject-matter out of which the alimony thus allowed is within its jurisdiction.

Reaffirmed and extended as to last paragraph in Zuver v. Zuver, 36 Iowa 194, 195, holding further that in an action for divorce the court may—under Sec. 2537 of the Code of 1860—make a just and proper order respecting both the permanent alimony and the custody of the children, in a divorce proceeding, even though the pleadings may contain nothing in reference to them.

EWELL v. GREENWOOD, 26 IOWA 377

1. Highway—Establishment of by Adverse Possession and Use.—If the public has claimed and continuously exercised the right of using land for a public highway, for a period equal to that fixed by the statute for bringing actions of ejectment, its right to the highway, as against such owner, is complete, there being no proof that the road was so used by leave, favor, or mistake, p. 379.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Rule 1 of Onstott v. Murray (22 Iowa 457), ante. p. 56.

2. Highway—Obstruction of a Nuisance—Injunction to Abate—Who May Maintain Action.—The obstruction of a public highway is, under the Code of 1860, a nuisance; and injunction lies for abatement thereof upon complaint in equity of any person specially injured thereby; and such plaintiff may therein recover damages specially caused to him, p. 380.

Reaffirmed in Hougham v. Harvey, 33 Iowa 205.

Reaffirmed and explained in Ingram, Kennedy & Day v. C. D. & M. R. R. Co., 38 Iowa 675, holding that an unlawful obstruction of a public highway is a public nuisance, not generally actionable, and a private person has a right of action, only when he suffers an injury distinct from the public, as a consequence of the wrongful act.

Reaffirmed and explained in Musser v. Hershey, 42 Iowa 364, 365, holding that one who will sustain special damage different in kind and degree to that which will be sustained by the public, may enjoin the erection of a public nuisance.

Reaffirmed and explained in Fuller v. C. R. I. & P. Ry. Co., 61 Iowa 128, 15 N. W. 863, holding that before a private individual

may enjoin and abate and recover damages by reason of a public nuisance set out in Sec. 3331 of the Code of 1873, he must aver and prove that it interferes with the comfortable enjoyment of his property.

Reaffirmed and explained in Innis v. Cedar Rapids, I. F. & N. W. Ry. Co., 76 Iowa 167, 168, 2 L. R. A. 282, 40 N. W. 702, holding that a private individual will not be allowed to maintain an action to restrain or abate a public nuisance, unless he can show that it occasioned some peculiar or special damage or injury to him.

Reaffirmed, explained and varied in Richards v. Holt & Hall, 61 Iowa 532, 533, 16 N. W. 596; Bushnell v. Robeson, 62 Iowa 545, 546, 17 N. W. 891; Littleton v. Fritz, 65 Iowa 494, 54 Am. Rep. 19, 22 N. W. 644, holding that one maintaining a nuisance may not only be punished in a criminal proceeding, but a civil action at law to recover damages in a proper case, and an action in equity to restrain the nuisance, may be prosecuted against him.

Reaffirmed and extended in Clayton County v. Herwig, 100 Iowa 632, 633, 69 N. W. 1035, holding further that in an action in equity by a county to correct a description in a deed to a highway and to reform the deed, the county may further ask and obtain an injunction enjoining and abating the nuisance of the unlawful obstructing the highway by the defendant.

Reaffirmed and varied in Park v. C. & S. W. R. R. Co., 43 Iowa 639, holding that one who is specially damaged by reason of the unlawful obstruction of a public highway may recover therefor in an action at law against the person who so obstructed it.

Reaffirmed and varied in Brandt v. Plumer, 64 Iowa 35, 19 N. W. 843, holding that in an action by a private individual to recover damages by reason of the unlawful obstruction of a highway, the plaintiff must aver and prove that he has sustained some special damage or injury not shared by the public generally.

Reaffirmed and varied in Ferguson v. Firmenich Mfg. Co., 77 Iowa 579, 14 Am. St. Rep. 319, 42 N. W. 449, holding that one who sustains special damages by reason of another unlawfully and wrongfully polluting a stream, may—under Sec. 3331 of the Code of 1873—maintain an action therefor.

Reaffirmed and varied in Harley v. Merrill Brick Co., 83 Iowa 77, 48 N. W. 1001, holding that Sec. 3331 of the Code of 1873, authorizes any person injured by a nuisance to recover damages therefor, and to maintain action for its abatement as well, although the public or other persons sustain like injury and damage.

Cited in State v. Close, 35 Iowa 572, the court holding that the nuisances declared by Sec. 4409 of the Code of 1860, become public or private as they tend to the public injury, or only to the injury of private individuals, as contra-distinguished from the public.

And see 151 Iowa 555.

Unreported citation, 132 N. W. 180.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

FARWELL & CO. v. HOWARD & CO., 26 IOWA 381

1. Insolvent Debtor—Sale or Mortgage to Secure a Creditor—When Valid—General Assignment, When Void.—An insolvent debtor, or one contemplating insolvency may, in good faith and in the absence of fraud, sell or mortgage a part or all of his property to secure a creditor or creditors, although such sale or mortgage may practically defeat all other creditors than him or those secured in the collection of their debts. Sec. 1826 of the Code of 1860, only applies to and renders void, a general assignment by an insolvent debtor, or one contemplating insolvency, when not made for the benefit of all creditors in proportion to the amount of their respective claims, p. 384.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under *Lampson & Powers v. Arnold* (19 Iowa 479), Vol. II, p. 751.

2. Garnishment—Liability of Garnishee to be Affirmatively Shown—Liability on Answer Alone, When.—In order to charge a garnishee, his liability must be affirmatively shown; it will never be presumed.

If it be sought to make him liable on his answer alone, it must contain a clear admission of a debt due to or possession of attached property of the defendant, p. 385.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Rule 1 of *Morse v. Marshall* (22 Iowa 290), ante. p. 34.

GRAY v. IOWA LAND CO., 26 IOWA 387

1. Municipal Corporations—Power to Vacate or Narrow Streets.—When empowered by its character, or under the general law, if incorporated thereunder, a city may vacate or narrow its streets, when the power is reasonably exercised and does not injure abutting lot owners, pp. 391, 392.

Reaffirmed and explained in *City of Marshalltown v. Forney*, 61 Iowa 583, 16 N. W. 742, holding that if the vacation of a street puts an end to the public use, it cannot affect the power of the city to vacate, that the vacation was made for the purpose of devoting the vacated street or alley to a private use: That if the power to vacate is otherwise rightfully exercised, and no private rights are injuriously affected, it is not material what object is intended to be promoted by the vacation.

Cited in *Burg, Adm'x, v. C. R. I. & P. Ry. Co.*, 90 Iowa 111, 48 Am. St. Rep. 419, 57 N. W. 681, not in point, but upon analogy.

Special cross reference. For further cases citing and sustaining etc., the text, and others, see annotations under Warren v. Mayor of Lyons City (22 Iowa 351), ante. p. 39.

Cross reference. See further on this question, annotations under Milburn v. City of Cedar Rapids (12 Iowa 246), Vol. II, p. 40.

BURTON v. MASON, 26 IOWA 392

1. Costs—Judicial Discretion of District Court—Plaintiff Obtaining Partial Relief.—Where plaintiff in an action in equity obtains partial relief, it is not reversible error or abuse of discretion for the district court to adjudge that the defendant pay his own costs, p. 395.

Special cross reference. For cases citing the text, and others in this connection, see annotations under Arthur v. Funk (22 Iowa 238), ante. p. 25.

KENDALL v. LUCAS COUNTY, 26 IOWA 395

1. Appeal to Supreme Court—Time in Which to be Taken.—Although Sec. 3507 of the Code of 1860, requires an appeal to the Supreme Court to be taken within one year after the rendition of the judgment, and although the record upon the appeal shows the judgment as of a date more than one year next preceding the taking of the appeal, yet if the transcript further shows that the trial court took defendant's motion for a new trial under advisement and decided upon it at a later term of court, and that the judgment was in fact rendered at the time the motion was overruled, and that the appeal was taken within a year from this last date, it will be deemed to have been taken in time, p. 396.

Reaffirmed in Mueller Lumber Co. v. McCaffrey, 141 Iowa 732-735, 118 N. W. 903, holding that—under Secs. 4106, 4110 of the Code of 1897, although an appeal to the Supreme Court must be taken within six months after the rendition of the judgment appealed from, yet the unsuccessful party may, after such time, appeal from the order overruling the motion for a new trial and within six months after the making of this latter order, and thereupon errors of the trial court upon such motion, will be reviewed, but not, in such last case, other errors appearing in the record.

(Note.—This last case overrules McLaughlin v. Hubinger Bros. Co., 135 Iowa 595, 113 N. W. 475. See, also, specially, In re Estate of Bishop, 130 Iowa 250, 106 N. W. 637; Hunt v. Iowa Central Ry. Co., 86 Iowa 15, 51 N. W. 1143, not citing the text.—Ed.)

2. Bridges—Liability of County for Damages Resulting from Negligently Failing to Build, Maintain and Repair.—It is the duty of the county, under the statute, to build, maintain and repair bridges when the expenditure necessary therefor is large; and where in such a case a county negligently fails to so repair, etc., it is liable in damages for injuries resulting therefrom, pp. 397, 398.

Reaffirmed and extended in Wand v. Polk County, 88 Iowa 619, 620, 55 N. W. 529, holding further that knowledge of a defect in a county bridge will not, of itself, constitute contributory negligence or defeat recovery by one for injuries thereby occasioned.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others on the question, see annotations under Soper v. Henry County (26 Iowa 264), ante. p. 321.

DECATUR COUNTY v. MAXWELL, 26 IOWA 398

1. Bail Bond—Forfeiture—Action on—Venue—To Whom Money Collected to be Paid.—Under Sec. 4993 of the Code of 1860, an action for judgment upon the forfeiture of a bail bond under an indictment must be brought in the district court of the county wherein the accused was to have appeared in such court to answer the indictment, and not—in a case of a change of venue—in the county of the district court wherein the indictment was returned.

And the money, when collected, is—under Sec. 3729 of the Code of 1860—to be paid to the county treasurer of the former county, for the benefit of the school fund, p. 399.

Reaffirmed as to first paragraph in Lucas County v. Wilson, 59 Iowa 356, 13 N. W. 326, under Sec. 4599 of the Code of 1873, corresponding to Section 4993 of the text.

Reaffirmed and extended in Shelby County v. Simmonds, 33 Iowa 346, 347, holding further that the county is a proper party to institute an action for judgment upon the forfeiture of a bail bond—although, says the court, “we do not determine that the action could not be properly brought in the name of the State.

Reaffirmed and qualified in Warren County v. Polk County, 89 Iowa 46-48, 56 N. W. 282, holding, however, that where an accused person deposits money in lieu of a bail bond in the district court where in an indictment is returned, and subsequently upon a change of venue the district court to which the prosecution is changed, forfeits the money upon the non-appearance of the accused, and orders the money to be paid to the county treasurer of the county wherein the indictment was returned, that this latter ruling and order, though erroneous, must be corrected by appeal, writ of error, or *certiorari* by the county to which the change of venue was granted and which is entitled to the sum, and not by independent action.

Cited in McDonald v. Second Nat'l Bank, 106 Iowa 533, 76 N. W. 1013, not in point.

STATE v. VAN HORTON, 26 IOWA 402

1. Criminal Law—Jeopardy—Appeal by State to District Court from Judgment of Conviction in Justice's Court—Effect—Practice.—If accused is acquitted in a justice's court having jurisdiction of

the offense, the State cannot, by appeal, force him into another trial; but the State may appeal in such case, only to settle the law for future cases, pp. 403, 406.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under *State v. Tait* (22 Iowa 140), ante, p. 11.

STATE v. JOHNSON AND JOHNSON, 26 IOWA 407, 96 AM. DEC. 158

1. Forgery Defined.—Forgery is the false making of any writing, or materially altering it, with intent to defraud, where the writing, if genuine, might be apparently of legal efficacy, or the foundation of a legal liability, p. 413.

Reaffirmed in *State v. Darrance*, 86 Iowa 430, 53 N. W. 282; *State v. Sherwood*, 90 Iowa 552, 48 Am. St. Rep. 461, 58 N. W. 912.

Cross reference. See further on this question, annotations and cross references under Rule 2 of *State v. Thompson* (19 Iowa 299), Vol. II, p. 729.

2. Indictment—Sufficiency of Allegations—Degree of Clearness Required.—Under the Code of 1860, it is sufficient if the offense in an indictment be charged in ordinary language and in such manner as to enable a person of common understanding to know what is intended, p. 415.

Reaffirmed in *State v. Caffery*, 94 Iowa 66, 62 N. W. 664, under the Code of 1873.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others, see annotations under Rule 1 of *State v. Thompson* (19 Iowa 299), Vol. II, p. 729.

DEEDS v. SANBORN, MARSHAL, 26 IOWA 419

(Former appeal, 22 Iowa 214.)

1. Municipal Corporations—Taxation—Agricultural Land Exempt from—Replevin by Land Owner.—Agricultural land used exclusively therefor, lying within the limits of a city or town, but which is remote from the city proper, and to or near which no streets or alleys have been worked, is exempt from municipal taxation; and the owner thereof may maintain replevin against an officer for personal property seized in attempting to collect such a tax, pp. 421, 422.

Special cross reference. For cases citing, sustaining and explaining the text, and many others, see annotations under *Buell v. Ball, marshal* (20 Iowa 282), Vol. II, p. 817.

HAWK EYE WOOLEN MILLS CO. v. CONKLIN, 26 IOWA 422

1. Partnership—Absolute Sale of Partnership Property—Rights of Creditors.—General creditors of a partnership have no

lien on the partnership property; and where the firm, in good faith, sells all of its property, the rights of the creditors so far as the property is concerned is lost; although in such case the creditors may, by proper procedure, subject the proceeds of the sale, pp. 425, 426.

Reaffirmed and explained in Smith v. Smith Bros., 87 Iowa 97-100, 43 Am. St. Rep. 359, 54 N. W. 74; First Nat'l Bank of Indianola v. Brubaker, 128 Iowa 591, 111 Am. St. Rep. 209, 2 L. R. A. (New Series), 256, 105 N. W. 117, holding that a partnership even though insolvent may, in good faith and for a valuable consideration, mortgage its property to secure its own or a member's creditor; and that creditors of the firm cannot set the instrument aside as fraudulent.

Reaffirmed and extended in George v. Wamsley, 64 Iowa 178, 20 N. W. 2, holding further that property of a firm may, for a valuable consideration, be transferred to a partner and be held by him free from partnership debts: And holding, also, that a partnership may, for a valuable consideration, pay the debt of a member of the firm with the firm's money; and that such transaction will not be fraudulent as to the creditors of the firm.

Reaffirmed and extended in Poole, Gilliam & Co. v. Seney, 66 Iowa 506, 507, 24 N. W. 29, holding further that where, upon dissolution, one partner takes the merchandise of the firm and the other takes certain other real and personalty as their separate shares and interests, and, thereafter one of the partners mortgages his property so taken, to secure his individual debt, the mortgage will not be held fraudulent as to the firm's creditors, although it appears that the partnership was insolvent at the time of dissolution, when it is, also, shown that this latter fact was unknown to the members and that they acted in good faith expecting the out-standing accounts to pay the debts.

(Note.—See further specially, Johnston v. Robuck, 104 Iowa 523, 73 N. W. 1062; Sylvester v. Henrich, 93 Iowa 489, 61 N. W. 942; City of Maquoketa v. Willey, 35 Iowa 325; Scudder v. Delashmutt, 7 Iowa 39, some important cases sustaining and explaining, but not citing the text—And there are others to the same effect.—Ed.)

STATE BANK OF INDIANA v. HARROW, 26 IOWA 426

1. Fraudulent Conveyances—Conveyance to Land Taken by Son to Defraud Creditors of Father Who Pays Purchase Money.—Where a conveyance to land is taken by a son with the fraudulent intent of hindering or delaying the creditors of his father who furnishes the purchase money, it will be declared fraudulent and void as to such creditors, p. 429.

Cited in Hickey v. Davidson, 129 Iowa 394, 105 N. W. 681 (dissenting opinion), the majority court holding that brothers and sisters of an insolvent brother may give and convey property to the

infant son of the latter and for the purpose of providing for their brother and placing the property out of the reach of his creditors.

PERRY v. HEIGHTON, 26 IOWA 451

1. Practice—Interrogatories Filed with Answer and Affidavit of Defendant—Dismissal without Prejudice.—Where defendant files interrogatories with his answer to be answered by plaintiff, and then, upon the latter failing to answer them, files his affidavit as allowed by Sec. 2991 of the Code of 1860, it is not error for the court to thereafter and before final submission of the cause, to dismiss the action without prejudice and at plaintiff's cost and upon motion of the latter. Sec. 3127 of the Code of 1860 authorizes dismissal without prejudice at any time before final submission to the court or jury, pp. 452, 453.

Cited in 148 Iowa 156, 125 N. W. 185.

STEPHENS v. HARROW'S HEIRS, 26 IOWA 458

1. Fraudulent Conveyance—Valid as Between Parties to and Their Heirs—Pari Delicto.—A fraudulent conveyance of land to defeat creditors, is valid as between the parties to the conveyance, their heirs and all persons claiming through them. Equity will not interfere in such case in favor of any of such parties, but will leave them as it found them, pp. 465, 466.

Reaffirmed in Weir v. Day, 57 Iowa 86, 10 N. W. 305; Cloud v. Malvin, 108 Iowa 59, 45 L. R. A. 209, 75 N. W. 647.

Reaffirmed and explained in Wright v. Howell, 35 Iowa 297, 298, holding that where a fraudulent conveyance of land is executed and recorded, and the grantor thereafter remains in possession, a subsequent purchaser thereof, in good faith, for value and without actual notice, either from the fraudulent grantee, or under an execution against him, takes it free from all claims of the fraudulent grantor, or his purchaser or mortgagee who takes subsequent thereto.

Reaffirmed and extended in Fordyce v. Hicks, 76 Iowa 42, 43, 40 N. W. 79, holding further that a fraudulent conveyance is valid as between the parties and all the world, except creditors of the grantor which it was executed to defeat.

(Note.—There are numerous cases sustaining but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Gardner v. Cole (21 Iowa 205), Vol. II, p. 893.

STATE v. NEWBERRY, 26 IOWA 467

1. Criminal Law—Assault with Intent to Commit an Offense or Crime—Allegations of indictment for— Assault with intent to Commit Murder.—An indictment for an assault with intent to com-

mit a specific crime or offense need not set out the elements thereof; but need only aver *what particular* crime or offense the accused committed the assault with such intention.

So an indictment for assault with intent to commit murder need not charge that it was done "with malice aforethought," pp. 467, 468.

Reaffirmed in State v. Shunka, 116 Iowa 207, 208, 89 N. W. 978.

Reaffirmed and explained as to first paragraph in State v. Jennings, 79 Iowa 514, 44 N. W. 799, holding that an indictment for burglary is sufficient if it avers that it was committed "with intention to commit a larceny," without averring the character, value and ownership of the property intended to have been stolen; That the crime is made out by proof of the breaking and entering with intent to commit the larceny, as well as if the accused actually committed that offense at the time of the burglary.

Reaffirmed and explained as to the first paragraph in State v. Mecum, 95 Iowa 438, 439, 64 N. W. 288, holding that an indictment for burglary in feloniously, etc., breaking and entering a dwelling house in the night time *with intent to commit adultery*, is sufficient, without averring that the accused is a married man, or that he committed the burglary with intention to have sexual intercourse with a married woman, or otherwise setting out the elements of adultery.

Reaffirmed and varied in State v. Keasling, 74 Iowa 531, 38 N. W. 399, holding that one indicted for assault with intent to commit murder may thereunder be convicted of assault with intent to commit manslaughter.

BROWN v. MALLORY, 26 IOWA 469

1. Actions—Original Notice—Petition Filed after Time Named in—Judgment, Validity—Collateral Attack—Practice.—The fact that a petition is filed after the time named in the original notice is not a ground for setting aside a judgment thereon rendered, in an action in equity to set it aside, when it does not appear that the defendant was deceived or misled by such filing of the petition; but such an irregularity must be corrected by motion, appeal or other ways prescribed by statute, p. 471.

Reaffirmed and explained in Hildreth v. Harney, 62 Iowa 421, 422, 17 N. W. 585; Roth v. Humbolt College, 89 Iowa 484, 485, 56 N. W. 659, holding that a judgment rendered upon a petition which was not filed within the time mentioned in the original notice is not void or subject to collateral attack.

Cross reference. See further on this question, annotations under Hudson v. Blaufus (22 Iowa 323), ante. p. 36.

2. Action in Equity—Adequate Remedy at Law—Demurrer Cannot Raise.—In an action in equity the fact that the plaintiff has an adequate remedy at law and therefore the action in equity does

not lie, cannot—under Sec. 2876 of the Code of 1860—be raised by demurrer, pp. 471, 472.

Special cross reference. For cases citing, sustaining and explaining the text, and many others, see annotations under Rules 1-3 of Byers v. Rodabaugh (17 Iowa 53), Vol. II, p. 491.

3. Pleading—Practice—Demurrer—Defendant Failing to Plead Over after His Demurrer to Petition Is Overruled—Judgment.—Where defendant demurs to plaintiff's petition, and, upon its being overruled, stands upon his demurrer, judgment will be rendered against him as in cases of default, p. 472.

Reaffirmed in Minear v. Hogg, 94 Iowa 645, 63 N. W. 445, under Sec. 2654 of the Code of 1873.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

SOUP v. SMITH, 26 IOWA 472

1. Appeal—Errors in Rulings Not Excepted to Below, Not Reviewed.—Errors in the ruling of the court below and not there excepted to by the party appealing and complaining, will not be reviewed or be cause for reversal by the Supreme Court, p. 473.

Reaffirmed in Barkdull v. Callanan, 33 Iowa 394.

Unreported citation, 133 N. W. 724.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

RICHMOND v. TIBBLES AND HUSBAND, 26 IOWA 474

1. Husband and Wife—Liability of Wife for Breach of Covenant of Warranty in Deed to Her Own Land.—Under the Code of 1860, a married woman is liable for breach of a covenant of warranty in her deed to her own land, pp. 475, 482.

Reaffirmed and varied in Mitchell v. Smith, 32 Iowa 487, holding that where a married woman who owns a farm and a great portion of the personalty thereon and who resides on it with her children and conducts the business, buys a horse to be worked in cultivating and operating it, she is liable for its purchase price, although a note therefor be executed by both her and husband.

Cited in Hoffman v. Stigers, 28 Iowa 308, the court holding that under the Code of 1860, a married woman may in relation to her property, real and personal, contract and be contracted with, sue and be sued, convey and receive conveyances, as the husband may: And hence holding that under that Code, a deed to land to a husband and wife jointly, creates a tenancy in common and not a joint tenancy, unless the contrary is expressed.

Cited in Jones v. City of Des Moines, 43 Iowa 210, the court holding that where a wife joins in the granting and covenanting clauses of her husband's deed to land, and signs the conveyance, it passes—

under Secs. 2209 and 2215 of the Code of 1860—all her interest therein, including the right to dower; and without an express relinquishment thereof.

Special cross reference. For further cases citing the text, and many others in this connection, see annotations under Rule 2 of Jones v. Crosthwaite (17 Iowa 393), Vol. II, p. 546.

MANSFIELD v. WILKERSON, 26 IOWA 482

1. Practice—Dismissal of Action without Prejudice, or Non-Suit—When Not Allowed as a Matter of Right.—Under Sec. 3127 of the Code of 1860, after a cause is finally submitted, the plaintiff cannot, as a matter of Right, dismiss without prejudice or take a non-suit; and it is not error in such case for the trial court to refuse to permit him so to do, p. 485.

Special cross reference. For cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 1 of Hays v. Turner (23 Iowa 214), ante. p. 95.

2. Attorney and Client—Interest—Money Collected by Attorney—When He Is to be Charged Interest on.—Where an attorney collects money of his client and uses it as his own, he will be charged interest thereon during the period of such use, pp. 485, 486.

Reaffirmed and varied in German Sav. Bank of Davenport v. Citizens' Nat'l Bank of Davenport, 101 Iowa 545, 546, 63 Am. St. Rep. 399, 70 N. W. 774, holding that where a bank pays a check on a depositor which is forged, and the depositor is thereby forced to deposit the amount of the check in order to keep his account intact, then in an action against the bank to recover the sum paid on the check, the depositor may recover interest thereon; although the bank allowed no interest to him on the amount of the deposit from which the check was paid.

(Note.—See further, Hubenthal v. Kennedy, 76 Iowa 707, 39 N. W. 694; Risser v. Rathburn, 71 Iowa 113, 32 N. W. 198; Goodnow v. Litchfield, 63 Iowa, 275, 19 N. W. 226, some important cases in this connection, not citing the text.—Ed.)

THOMPSON v. PERKINS, 26 IOWA 486

1. Trial—Verdict—Quotient Verdict, or One Determined by Lot—Repudiation of and return of Legal Verdict—What to be Shown on Motion for New Trial.—Where a party moves for a new trial on the ground that the verdict of the jury was determined by lot, or was a quotient verdict, and files affidavits of jurors in support of the motion, and the adverse, successful party claims, and files affidavits of jurors in support thereof, that after the jury so illegally determined upon their verdict, they repudiated it, retraced their steps, and in fact determined and returned a verdict in accord with the law,

the proof of this latter hypothesis must be clear and satisfactory, or the motion will be sustained and a new trial ordered, p. 487.

Cited in Sylvester v. Town of Casey, 110 Iowa 262, 81 N. W. 457, a case wherein a quotient verdict was set aside and a new trial ordered.

Cross reference. See specially, in this connection, annotations under Rules 1 & 2 of Wright v. Ill. & Miss. Tel. Co. (20 Iowa 195), Vol. II, p. 800.

SHAWHAN, ADMINISTRATOR, v. LONG, 26 IOWA 488, 96 AM. DEC. 164

1. **Estoppel—Vendor Executing Deed and Receiving Consideration from Executor Estopped to Deny Latter's Authority, or Validity of Transaction.**—Where a vendor executes a deed to land to an executor and receives the consideration therefor, he is thereafter estopped to deny the validity of the transaction or the authority of the executor, when sued by the executor for rents for the land collected by him (vendor) and accruing after the execution of the instrument, p. 490.

Distinguished and narrowed in Capper v. Sibley, 65 Iowa 756, 23 N. W. 154, holding that a party may deny the validity of an instrument, or the legal capacity of the other party thereto, when he (the objecting party) has not received the entire consideration.

2. **Decedent's Estate—Rents of Land Accruing after Intestate's Death—When Administrator May Sue for.**—Under Chap. 139, Laws of 1866, an administrator cannot sue and recover rents of land, accruing after the death of his decedent, unless there are no heirs competent to take possession of the realty, p. 492.

Reaffirmed in Toerring v. Lamp, 77 Iowa 491, 42 N. W. 379; Durlam v. Steele & Jenks, 88 Iowa 501, 55 N. W. 510.

(Note.—There are numerous cases sustaining and explaining, but not citing, the text.—Ed.)

HEIRS OF KLEIN v. ARGENBRIGHT, 26 IOWA 493

1. **Lands—Patents—Patent Relates to Date of Certificate—Rights of Intervening Certificate Holders.**—When a patent to land is issued it relates to and takes effect as of the date of the certificate of location or entry, and cuts off the rights of a holder of a certificate issued after the one on which the patent is based, p. 496.

Reaffirmed and explained in Waters v. Bush, 42 Iowa 256; Rankin v. Miller, 43 Iowa 17; Weeks v. Loy, 52 Iowa 206, 2 N. W. 1079, holding that the issuance of a patent to land vests the patentee with the perfect legal title *as of the date of the entry of the land*: That the entry of the land and the issuance of the certificate of location, transfers to the holder all the property held by the government therein, and "all the equity thereto"; or an absolute and unconditional right thereto, the government retaining only the legal title in trust for the purchaser or holder of the certificate until the patent is issued.

Reaffirmed and qualified in Rankin v. Miller, 43 Iowa 17, holding that a certificate of location cannot be changed by the register of the land office so as to cover land for which the Government has issued another certificate; and that a patent issued therefor on such changed certificate is void.

Cited in Durham v. Hussman, 88 Iowa 36, 55 N. W. 14, not in point, but upon analogy.

Distinguished in Reynolds v. Plymouth County, 55 Iowa 93, 7 N. W. 469, holding that one who obtains a patent to land under a forged warrant or scrip, obtains no title thereto; and such land is not taxable.

2. Public Lands—Conflicting Entries—Notice.—In cases arising under conflicting entries of Government lands, the doctrine of notice is not recognized, p. 497.

Reaffirmed in David v. Rickabaugh, 32 Iowa 544, 545; Rankin v. Miller, 43 Iowa 18; Harmon v. Clayton, 51 Iowa 41.

Cited with approval in Pinckney v. Pinckney, and Collie, 114 Iowa 443, 87 N. W. 407, not in point.

BENNETT v. FISHER, 26 IOWA 497

1. Constitutional Law—Retrospective or Retroactive Statutes—To What Extent Upheld—Curative Statutes, Validity.—The enactment of retrospective or retroactive statutes as distinguished from *ex post facto* laws, is not prohibited either by the State or National constitutions; and in the absence of a constitutional inhibition, the Legislature may pass such laws; but where they interfere with vested rights they will be declared void or inoperative to that extent.

Courts will construe all statutes to be prospective only, except where the Legislature expressly declares or otherwise shows a clear intent that the statute shall have a retrospective or retroactive operation or effect.

So the Act of 1868 (Laws of 1868, p. 40), legalizing certain acts in relation to the establishment of county roads is constitutional, pp. 498-501.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Rules 1 and 3 of State v. Squires (26 Iowa 340), ante. p. 334.

DICKEY v. HARMON, 26 IOWA 501

1. Appeal—Excessive Judgment on Promissory Note—Necessity of Motion to Correct Before Appeal is Taken—Review.—Under Sec. 3545 of the Code of 1860, a judgment on a promissory note will not be reversed upon appeal to the Supreme Court because it is for too large a sum, unless a motion to correct was made in the court below before the appeal was prosecuted, p. 502.

Reaffirmed and explained in Black v. Boyd, 52 Iowa 719, 720 (abstract), 2 N. W. 1045, holding that—under Sec. 3168 of the Code of 1873, corresponding to the section of the text—an objection that a judgment in an action for a debt or sum of money due is excessive, will not be considered by the Supreme Court, unless a motion to correct was made in the court below before the appeal was taken: And that a general exception in the lower court to such a judgment is insufficient: That in such case there must be a motion for a new trial below on that ground, or, at least, the trial court's attention must be specially called to the fact that such judgment is excessive, in order that he be granted an opportunity to correct it before the appeal is taken—And to the same effect is Small v. C. R. I. & P. R. R. Co., 55 Iowa 594, 8 N. W. 443 (reaffirming the text), being an action for damages for negligence—And to the same effect, also, is Yancey v. Tatlock, 93 Iowa 388, 389, 61 N. W. 998, (reaffirming the text), being an action for damages for breach of covenants in a deed, where it was objected upon appeal that the judgment was for more than prayed for in the petition.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross references. See further on this question, annotations under Rule 2 of Finch v. Billings (22 Iowa 228), ante. p. 23; Pigman v. Denney (12 Iowa 396), Vol. II, p. 66.

HARSHBERGER v. HARSHBERGER, 26 IOWA 503

1. Divorce and Alimony—Jurisdiction of District Court—Alimony, Property Rights of Parties, and Custody of Children—Power of Court Over—Service of Original Notice by Publication.—Under Sec. 2532 of the Code of 1860, the district court of the county wherein the plaintiff resides has jurisdiction of all cases of divorce and alimony, and of guardianship connected therewith. Under Sec. 2537 of the Code of 1860, when a divorce is decreed the court may make such order in relation to the children and property of the parties, and the maintenance of the wife as shall be right and proper.

The district court of the county having jurisdiction of the cause of action for divorce may award and enforce any lien connected with the subject-matter, although the real estate upon which the lien is claimed, awarded and enforced, is situated in another county.

Alimony is an incident to divorce, and can only follow it, and the statute authorizing service of notice by publication in an action for divorce, cannot fairly be construed to limit the power of the court where service is thus made, to simply granting a divorce. It has jurisdiction of *the cause*, and may make all proper orders as to alimony, the custody of children, etc., which are incident to the divorce. But its orders as to alimony when service is by publication is binding only so far as the subject-matter out of which the alimony is allowed is within

its jurisdiction; and if the court, upon such service, renders a judgment for so many dollars as alimony, it will not be held conclusive, and, perhaps, not even valid in a foreign jurisdiction, pp. 504, 506.

Reaffirmed as to second paragraph in Twing v. O'Meara, 59 Iowa 331, 13 N. W. 323.

Reaffirmed and qualified as to second paragraph in Rea v. Rea, 123 Iowa 243, 98 N. W. 788, holding that in an action for divorce all orders or judgments allowing either alimony or costs against a non-resident defendant who has neither appeared nor been served with process in the state where the suit is pending, and has no property therein, are invalid.

2. Attachment—Rights Acquired by Levy of Attachment.—

An attachment creditor acquires no greater rights by the levy of his attachment than his debtor has at the time the levy is made, p. 506.

Reaffirmed in Rea v. Wilson, 112 Iowa 519, 84 N. W. 540.

Cross references. See further on this question, annotations under Thomas v. Hillhouse (17 Iowa 67), Vol. II, p. 495. See, also, in this connection, annotations under Welton v. Tizzard (15 Iowa 495), Vol. II, p. 371.

RILEY v. MONAHAN, 26 IOWA 507

1. New Trial—Witness Not Sworn Before Testifying—Waiver of Error.—The fact that a witness for a successful litigant was not sworn is not a ground for a new trial, where the unsuccessful party moving for the new trial on account thereof, does not negative the fact that it was unknown to him *and* his attorney until *after the verdict was returned*, pp. 509, 510.

Cited in Hurtert v. Weines, 27 Iowa 136, 99 Am. Dec. 645, the court holding that the fact that a juror who tries a case the second time had sat as a juror upon a previous trial thereof, is not a ground for a new trial, when the motion for the new trial and the affidavit in support thereof does not negative knowledge of this fact on the part of the party moving for the new trial and his attorney, and the record shows that the parties *consented* to the jury upon the second trial.

Cited in Foedisch v. Ch. & N. W. Ry. Co., 100 Iowa 731, 69 N. W. 1057, the court holding that where a party knows of the misconduct of a juror before the conclusion of a trial, but fails to call the attention of the court thereto, and proceeds thereafter with the trial without objection, he thereby waives his right to insist upon such misconduct as a ground for a new trial.

2. New Trial—Matter of Law Purely as Ground—Review of Ruling on Upon Appeal.—Where a motion for a new trial is based upon a matter of law purely, the ruling of the trial court thereon will

be reviewed upon appeal to the Supreme Court, with the same freedom and upon like principles as the lower court's ruling on any other question of law, p. 510.

Reaffirmed in Turley v. Griffin, 106 Iowa 163, 76 N. W. 661.

Cross reference. See further on this question, annotations under Rule 1 of Shepherd v. Brenton (15 Iowa 84), Vol. II, p. 308.

McCULLUM v. MCKENZIE, 26 IOWA 510

1. **Wills—Subsequent Birth of Child After Making of Will by Parent—Implied Revocation.**—The birth of a child to a parent after the making of a will by the latter, although the child is born before the death of the testator operates to impliedly revoke the will, pp. 511, 514, 515.

Reaffirmed in Fallon v. Chidester, 46 Iowa 589, 590, 26 Am. Rep. 164; Alden v. Johnson, 63 Iowa 126, 18 N. W. 697.

Reaffirmed and extended in Carey v. Baughn, 36 Iowa 542, 544, 14 Am. Rep. 534, holding further that where a will of a parent is impliedly revoked by the subsequent birth of a child to him, parol evidence of a republication of the instrument is inadmissible to give it *validity*.

Reaffirmed and extended in Negus v. Negus, 46 Iowa 488, 490, 26 Am. Rep. 157, holding further that where a father with two children living, devises and bequeaths all of his property real and personal to his wife, the subsequent birth of another child or children, impliedly revokes the will *in toto*.

Reaffirmed and extended in Milburn v. Milburn, 60 Iowa 412, 413, 14 N. W. 204, holding further that where a putative father notoriously recognizes his bastard child, it legitimatizes the child under our statute (Code of 1873), and operates as an implied revocation of a will executed by such father previous to the birth and recognition of the child.

Reaffirmed and extended in Rowe v. Rowe, 120 Iowa 19, 20, 94 N. W. 258, holding further that the fact that an after-born child is given a remainder in realty by the previously executed will of the father, when the instrument grants power to the life tenant to sell, does not change the rule.

Distinguished and narrowed in In re Estate of Brown, 139 Iowa 227, 228, 117 N. W. 263, holding that a decree of divorce and allowance of alimony will not, of itself, impliedly revoke a previous will in favor of the wife.

And see 151 Iowa 42.

Unreported citation, 130 N. W. 136.

Cross reference. See further, in this connection, Sec. 3276 of the Code of 1897.

COFFIN, EXECUTOR, *v.* CITY COUNCIL OF DAVENPORT, 26 IOWA 515

1. Appeal—Review of Errors of Law—Motion for New Trial not Required where Action at Law is Tried by Court—Constitutional Law—Chap. 49, Laws of 1866, Constitutional.—Where an action at law is tried by the court, a jury being waived by the parties, then—under Sec. 2, Chap. 49, Laws of 1866—no finding of facts and conclusions of law is required to be made by the trial court; nor need a motion for a new trial be made and overruled, in order to authorize review of errors of law upon an appeal to the Supreme Court, where the record thereon contains all of the evidence introduced below. Chap. 49, Laws of 1866, is constitutional, pp. 519, 520.

Reaffirmed in Drefahl *v.* Tuttle, 42 Iowa 181, 182, under Secs. 3169, 3170 of the Code of 1873, the law of the text, the latter section being Sec. 2 thereof, a case, however, wherein the trial court made a finding of facts and conclusions of law, from which the error of law for which the judgment was reversed was made to appear.

Reaffirmed and extended in Presnall *v.* Herbert, 34 Iowa 540, holding further that, under Chap. 49, Acts of 1866, errors of law occurring upon a jury trial and excepted to at the time they were made, by the party complaining, may be reviewed upon appeal to the Supreme Court, although not made grounds for a motion for a new trial below; and that the rule applies to errors of the trial court in admitting or excluding evidence, and in giving or refusing instructions.

Reaffirmed and extended in Brown *v.* Rose, 55 Iowa 735, 7 N. W. 134, holding further that under Sec. 3169 of the Code of 1873, being Sec. 1 of the law of the text, rulings of the trial court upon questions of law made during the course of a jury trial, and excepted to at the time, will be reviewed by the Supreme Court upon appeal, although no motion for a new trial was made below: And holding further that Sec. 3168 of the Code of 1860, providing that a judgment or order shall not be reversed for an error which can be corrected on motion in an inferior court, until such motion has been made there and overruled, applies only to such errors as, without such motion, would not be called to the attention of the court below.

2. Municipal Corporations—Mandamus to Compel Payment of Judgment Against.—A judgment creditor of a city may, by mandamus, compel the city council thereof to pay thereon the amount collected by the city as taxes and which is left after defraying the city's ordinary and necessary expenses. And if it appears that such overplus is only one-fourth the amount of such judgment, the judgment in the mandamus action may order that one-fourth thereof be paid in the year in which the mandamus action is instituted, and one-fourth thereof be paid in each of the next three succeeding years, p. 520.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under *Coy v. City Council of Lyons City* (17 Iowa 1), Vol. II, p. 479.

Cross reference. See further on this question, annotations under Rule 2 of *Oswald v. Thedinga* (17 Iowa 13), Vol. II, p. 481.

SYKES v. BATES, 26 IOWA 521

1. Statute of Frauds—Vendor and Purchaser—Parol Contract for Sale of Real Estate—Part Payment of Purchase Price by Vendee.—A parol contract for the sale of real estate under which the vendee pays part or all of the purchase money is valid and not within the Statute of Frauds.

And the payment may be made by the vendee to the agent of the vendor, or to one authorized by the agreement to receive it, p. 523.

Reaffirmed and explained in *Chamberlain v. Robertson*, 31 Iowa 412, 413, holding that where a purchaser under a verbal contract for the sale of land pays the purchase price thereof to the agent of the vendor, and enters into possession of the land by consent of such agent, the contract is taken out of the Statute of Frauds.

2. Evidence—Witnesses—Competency—Testimony of Party Where Adverse Party is Administrator—Sec. 3982 of the Code of 1860, Construed.—In an action by a purchaser of land against the administrator of the vendor to recover the purchase price paid, the vendor having failed to execute a deed during his lifetime, where it appears from other evidence that the purchaser paid part of the purchase price in cash, and was, by the agreement, to send the balance to the vendor by express in care of a named person, the plaintiff (purchaser) may, under Sec. 3982 of the Code of 1860, testify to the fact that he sent the balance by express in a package addressed to the vendor at his place of residence in care of the named person, it appearing that no one else knew the contents of the package.

The above section did not intend, with respect to cases in which an executor was an adverse party, to make the rule as to the competency of evidence more strict than it was at Common Law, and at Common Law the evidence for the specific purpose for which it was offered and used was, from the necessity of the case, regarded as competent, pp. 524, 525.

Reaffirmed and explained in *Cummins v. Hull's Adm'r*, 35 Iowa 254, holding that in an action in which a personal representative is a party, the party adverse to him may (under Secs. 3980, 3982 of the Code of 1860), testify as to facts which, from their nature, he alone would be likely to know.

HUEY v. HUEY, 26 IOWA 525

1. Administrators and Executors—Non-Resident Executor—Action Against—Jurisdiction of Court.—In an action by a widow against a non-resident executor and the sureties on his bond for her distributive share of her husband's estate ordered paid to her by the executor by the county court appointing him, it is no defense that at the time the county court made the order the executor was a non-resident, and that notice of the application for the order was served on him in the foreign state; especially where the county court found expressly that he (the executor) was "served with due and legal notice)."

In his representative capacity, an executor although a non-resident is subject to the jurisdiction of the county court which appointed him, p. 527.

Cited in Ch. B. & Q. Ry. Co., v. Gould, 64 Iowa 346, 347, 20 N. W. 466, the court holding that a non-resident is not—under the Code of 1873—disqualified to be appointed an administrator; but should it appear that process or orders could not be served upon him for the reason of his absence from the State, or that such service was so delayed as to obstruct the prompt proceeding in the administration of the estate, it would and should be the cause of the removal of the administrator: And such non-resident could be, and ought to be, required by prompt periodical appearance in the court at sufficiently brief intervals or in other ways to afford facilities for the service of process and orders upon him, so that the settlement of the estate would not be delayed, and that all persons interested therein, as well as creditors, would not be subjected to inconvenience and delay in proceedings affecting their rights: And holding, also, that a non-resident ought not to be appointed an administrator in any case, unless it be made to appear that the interest of the estate, and of heirs and creditors, will be as well protected by such an administrator as by one who resides within the State; and that ordinarily, and without the existence of facts above contemplated, a non-resident ought not to be charged with the duty of administering upon an estate.

HOWELLS v. PATTON, 26 IOWA 531

1. Limitation of Actions—Action on Contract—When Bar of Statute is Removed by Testimony or Answer of Defendant.—In an action on a contract, in order to remove the bar of the statute of limitation as provided by Sec. 2742 of the Code of 1860, it must be made to appear affirmatively from either the answer or the testimony, that the cause of action still justly subsists, pp. 536-538.

Reaffirmed in McNit v. Helm, 29 Iowa 303, 304; and 33 Iowa 344, 345; Stewart v. McMillan, 34 Iowa 457.

(Note.—There are numerous cases, sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 1 of *Hunt v. Coe*, and *Wells* (15 Iowa 197), Vol. II, p. 325.

DAVIS v. BURLINGTON & MISSOURI RIVER R. R. Co., 26 Iowa 549

1. Railroads—Liability for Injury to or Killing Stock.—If stock is killed or injured by a railroad company where it has a right to but does not fence, it is liable absolutely, under Chap. 169, Acts of 1862: If there be a fence, gross negligence on the part of the company must be shown in order to fix any liability: But if the injury or killing occurs where there is no right of the company to fence, the company is held to reasonable care, and is liable for ordinary negligence.

But Chap. 169, Acts of 1862, does not apply to or give a railroad company a right to fence, or fix such absolute liability for its failure to fence, depot grounds, or its right of way to its road or switches in cities or towns, or along streets and alleys thereof, pp. 551-556.

Reaffirmed in *Packard v. Ill. Cent. R. R. Co.*, 30 Iowa 475; *Smith v. Ch. R. I. & P. R. R. Co.*, 34 Iowa 507-509, holding that a railroad company is only liable for want of ordinary care or diligence in preventing the injury to or killing of stock on its unfenced depot grounds.

Reaffirmed as to second paragraph in *Rogers v. Ch. & N. W. R. R. Co.*, 26 Iowa 558; *Durand v. Ch. & N. W. R. R. Co.*, 26 Iowa 561; *Latty v. B. C. R. & M. Ry. Co.*, 38 Iowa 251; *Blanford v. Minn. & St. L. Ry. Co.*, 71 Iowa 312, 313 (cited in dissenting opinion, 314), 60 Am. Rep. 795, 32 N. W. 359.

Reaffirmed, explained and extended in *Clary v. Iowa Midland R. R. Co.*, 37 Iowa 348, 349, holding that under the law of the text it is lawful and railroad companies have the right to fence their roads, and their absolute liability attaches for stock killed or injured, at any point on the line of their road where it is not fenced, except at crossings of streets and highways, and on depot grounds: And holding further that under Sec. 1, Chap. 79, Laws of 1868, a railroad company running and operating its cars under a lease is absolutely liable, to the same extent for stock killed or injured by its trains at points on the road where it was lawful to fence and where no fences had been erected, as if it owned the road; and it cannot relieve itself of this liability by a private contract with the lessor of the road.

Reaffirmed, varied and qualified in *Andre v. Ch. & N. W. R. R. Co.*, 30 Iowa 109, 110; *Comstock v. Des Moines Valley R. R. Co.*, 32 Iowa 377-379; *Mundhenk v. C. I. R. R. Co.*, 57 Iowa 720, 11 N. W. 657, holding that it is the duty of a railroad company to fence its right of way which runs parallel to or as it approaches a highway crossing, and to erect cattle guards at such crossing, when it is "fit and proper and suitable, and does not inconvenience" the public; failing which it is liable under the law of the text for injury to or

killing of stock at any such place: And holding further that in such cases the question of whether or not the injuring or killing occurred at a place where it was "fit, proper and suitable" for the railroad company to fence, as above, should be submitted to the jury—And the Comstock case holding that in such case the burden is on the plaintiff to prove the affirmative of this proposition.

Distinguished and narrowed as to second paragraph in Coyle v. Ch. M. & St. P. Ry. Co., 62 Iowa 519-521, 17 N. W. 771, holding that it is necessary for a railroad company for the purpose of avoiding the statutory liability for killing stock on the line of its road, within the limits of corporate towns, and outside of the first street or alley of the town, to fence the line against stock running at large—The court saying: "Indeed, we go a step farther and hold that a railroad has the right to fence within the corporate limits of a town, when such lands extend beyond streets or other highways. That is, such portion of the corporate territory through which a railway runs as lies outside of or beyond streets, or other public highways, may be fenced by the railway company along its right of way, to the same extent and in the same manner as if the municipal corporation did not exist, unless, possibly, there is an ordinance of the town which would control such right."

Distinguished and narrowed as to second paragraph in Peyton v. Ch. R. I. & P. Ry. Co., 70 Iowa 523, 524, 30 N. W. 878, holding that depot grounds as mentioned in the text and which a railroad company has no right to or is not bound to fence as provided in the law thereof, are only such grounds and parts of its track or tracks and switches used for the purpose of the transaction of business between it and the public; and that such company is liable absolutely under the law of the text, for injury to or the killing of stock on its unfenced track or switch not so used.

ROGERS v. CHICAGO & NORTHWESTERN R. R. Co., 26 IOWA 558

1. **Railroads—Liability for Injury to or Killing Stock.**—If stock is killed or injured by a railroad company where it has a right to but does not fence, it is liable absolutely, under Chap. 169, Acts of 1862: If there be a fence, gross negligence on the part of the company must be shown in order to fix any liability: But if the injury or killing occurs where there is no right of the company to fence, the company is held to reasonable care, and is liable for ordinary negligence.

But Chap. 169, Acts of 1862, does not apply to or give a railroad company a right to fence, or fix such absolute liability for its failure to fence depot grounds, or its right of way to its road or switches in cities or towns, or along streets and alleys thereof, p. 559.

Reaffirmed as to second paragraph in Gibson v. Iowa Cent. Ry. Co., 136 Iowa 417, 418, 113 N. W. 927.

Special cross reference. For further cases, sustaining, explaining, distinguishing, etc., the text, and others, see annotations under Davis v. B. & M. River R. R. Co. (26 Iowa 549), ante. p. 361, next preceding this case.

DURAND v. CHICAGO & NORTHWESTERN R. R. Co., 26 IOWA 559

Special cross reference. For points decided in this case, cases citing, sustaining, explaining, distinguishing it, etc., and others, on the question, see second paragraph of Rule, and annotations of Davis v. B. & M. R. R. Co. (26 Iowa 549), ante. p. 361.

TURNER v. FIRST NATIONAL BANK OF KEOKUK, 26 IOWA 562

(Later Appeal, 30 Iowa 191.)

1. Pleading—Petition—Joinder of Causes of Action—Causes of Action Ex Contractu and Ex Delicto.—Under Sec. 2844 of the Code of 1860, plaintiff may join in his petition, causes of action *ex contractu* and *ex delicto*, if they arise against the same defendant or defendants in the same right and have the same venue, p. 566.

Reaffirmed in Devin v. Walsh, 108 Iowa 430, 79 N. W. 134, under the Code of 1897.

2. Pleading—Petition—Non-Joinder and Misjoinder of Parties—Practice—Demurrer and Motion to Strike.—Under the Code of 1860, a demurrer lies to a petition for non-joinder of parties; but a misjoinder of parties therein must be reached by a motion to strike out the parties improperly joined, p. 567.

Reaffirmed in Dubuque County v. Reynolds, 41 Iowa 455; Miller Trustee, v. Keokuk & Des Moines Ry. Co., 63 Iowa 683, 16 N. W. 568, under the Code of 1873.

Reaffirmed in Citizens' State Bank v. Jess et al, 127 Iowa 455, 103 N. W. 473, holding—under the Code of 1897—that the question of a misjoinder of parties or of causes of action, must be raised by motion and not by demurrer.

Distinguished in Smith et al, R. R. Com'rs v. C. M. & St. P. Ry. Co., 86 Iowa 204, 53 N. W. 128, holding that the right of plaintiff to maintain an action may—under the Code of 1873—be raised by demurrer.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

HULL & Co. v. ALEXANDER, 26 IOWA 569

1. Trial—Evidence—Refreshing Memory of Witness by Former Memorandum or Deposition Made by Him.—The memory of a witness may be refreshed by producing to him a memorandum made by him, but he must then testify to the facts therein from his independent memory, and the memorandum cannot be read as evidence.

And this rule applies to a deposition given by the witness in another case, pp. 570, 571.

Reaffirmed in Riordan v. Guggerty, 74 Iowa 693, 39 N. W. 109.

Reaffirmed and extended in State v. Miller and Kremling, 53 Iowa 155, 4 N. W. 901, holding further that it is not necessary that the writing used to refresh the memory of a witness be made by his own hand; and that, therefore, a witness upon the trial of an indictment may, for such purpose, be permitted to examine the minutes of his testimony before the grand jury.

• *Unreported citation*, 80 N. W. 659.

2. Mortgaged Property—Purchaser Assuming Debt—Effect—Purchaser Subject to Mortgage—Effect.—Where a purchaser of mortgaged property agrees to pay or assumes the mortgage debt as part of the consideration of the purchase, he is bound therefor; and if he thereafter allows the property to be sold under foreclosure and it fails to bring the debt, he is bound for the deficit. But a purchase of mortgaged property *subject to a mortgage* does not bind the purchaser to pay the mortgage debt, but he may either do this or permit the property to be sold therefor, pp. 572, 573.

Reaffirmed in Lewis v. Day, 53 Iowa 579, 5 N. W. 756; Rice v. Hulbert, 67 Iowa 727, 25 N. W. 899.

Cited in McHose v. Dutton, 55 Iowa 730, 8 N. W. 668, the court holding that one for whose benefit a promise or agreement is made, may sue thereon.

Distinguished and narrowed in Wightman v. Spofford, 56 Iowa 148, 8 N. W. 681, holding that where a purchaser of a contract to convey land, accepts a transfer thereof from the vendee, he thereby becomes a party to the contract, and is personally liable for the purchase price, upon the vendor complying or offering to comply therewith.

And see 149 Iowa 224.

Unreported citation, 128 N. W. 301.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross references. See further on this question, annotations under Foster v. Marsh (25 Iowa 300), ante. p. 267; Johnson v. Monell (13 Iowa 300), Vol. II, p. 153; Moses v. Clerk of Dallas District Court (12 Iowa 139), Vol. II, p. 27; Corbett v. Waterman (11 Iowa 86), Vol. I, p. 778.

3. Trial—Misconduct of Counsel in Making Closing Argument—New Trial or Reversal for—Discretion of Trial Court.—Misconduct of counsel in his closing argument to the jury will not be cause for reversal upon appeal, when the trial court refused to grant a new trial for such reason, and it is not shown that the lower court abused his judicial discretion, vested in him in such case, in so doing, p. 573.

Reaffirmed in Wissler v. City of Atlantic, 123 Iowa 16, 98 N. W. 133.

4. Appeal—Verdict Against Weight of Evidence as Ground for Reversal—Evidence Conflicting.—Where the evidence upon the trial below was conflicting, and the trial court refused to grant a new trial because the verdict was against the weight of the evidence, the appellant must make out a very strong case of this fact upon appeal, to justify a reversal upon this ground, p. 573.

Reaffirmed in Hubbell and Brother v. Ream, 31 Iowa 296.

(Note.—There are numerous cases, sustaining, but not citing, the text.—Ed.)

AVERY v. WILSON, 26 IOWA 573

1. Pleadings—Amendment to Correct Variance Between Petition and Proof.—It is not an abuse of discretion or reversible error for the trial court to permit plaintiff to file an amendment correcting the averment in the petition as to a note sued on, and in order to avoid a variance between the petition and proof in reference thereto, p. 575.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Rule 1 of Fulmer v. Fulmer (22 Iowa 230), ante. p. 23.

VAN DRIEL v. ROSIERZ, 26 IOWA 575

1. Vendor and Purchaser—Contract to Convey or Title Bond—Assignment of—Rights of Assignee to Rents of Land.—The assignment by the purchaser of land of the contract to convey or the title bond, does not, unless the assignment expressly so provides, give the assignee a right to the rents which accrued under a lease of the purchaser or assignor *before the assignment is made*; but it gives him—the assignee—the right to the rents which accrue after the making thereof, pp. 577, 578.

Reaffirmed in Winn v. Murehead, 52 Iowa 65, 2 N. W. 950; Topping v. Lamp, 77 Iowa 490, 42 N. W. 379.

Reaffirmed and qualified in Hall v. Hall, 150 Iowa 278, 129 N. W. 960, holding that although unaccrued rent not reserved in a deed to land passes to the grantee, yet this rule does not apply to rent accruing after the execution of a deed to land, and while the grantor retains possession thereof, unless the instrument stipulates to the contrary.

Cited in Townsend & Knapp v. Isenberger, 45 Iowa 672, the court holding that crops reserved to a land owner by a lease, are rent; but that in such case the ownership of the tenant therein continues until they are set apart by him to the land owner.

Cross references. See further on this question, annotations under Van Wagner v. Van Nostrand (19 Iowa 422), Vol. II, p. 744; Rule

1 of *Hatfield v. Lockwood* (18 Iowa 296), Vol. II, p. 635; *Abercrombie v. Redpath* (1 Iowa 110), Vol. I, p. 169.

McKEE v. REYNOLDS, 26 IOWA 578

1. Husband and Wife—Agreement of Separation of—Relinquishment of Dower, Etc.—A husband and wife may, in good faith and in the absence of fraud, enter into an agreement for immediate separation, whereby the wife or the husband, as the case may be, for a valuable consideration, relinquishes dower or other interest in the realty of the other consort, pp. 585, 589.

Cited in *Garner v. Fry*, 104 Iowa 519, 73 N. W. 1080, the court holding that Sec. 3154 of the Code of 1873, only forbids contracts between a husband and wife concerning their interests in property arising from the marital relation, and not in reference to that derived from some other source.

Cited in *Baird v. Connell*, 121 Iowa 284, 96 N. W. 865, the court holding that under Sec. 3154 of the Code of 1897, when property is owned by a husband or wife, the other has no interest therein which can be the subject of contract between them, yet this section only relates to the interest the husband or wife has in the lands [Note.—This case involved a land transaction only.—Ed.] of the other which arise out of or is created by the marriage relation, and does not apply to any interest the husband or wife may have in the land of the other, derived from or based upon any other source: That under Sec. 3157 of the Code of 1897, a conveyance by a husband or wife to the other consort in any other case than as above is valid, the same as if between any other persons: Holding, also, that an agreement between husband and wife for future separation is against public policy and is void, except in so far as it provides for maintenance or other collateral engagements.

Cited in *Fowler v. Chadina*, 134 Iowa 214, 120 Am. St. Rep. 433, 13 Am. & Eng. Ann. Cas. 141, 111 N. W. 810, the court holding that a wife may relinquish her dower interest in land conveyed by her husband, by a separate quit-claim deed executed by her subsequent to the deed executed by her husband.

Cited in *Caruth v. Caruth*, Adm'r, 128 Iowa 122, 123, 103 N. W. 103, the court holding that personal property of a decedent is governed by and distributed according to the law of the domicile of the decedent at the time of his death: And holding therefore that a widow of a person who died domiciled in this State, is entitled to her distributive share in her husband's estate, although she and her husband had entered into an agreement of separation in a state where such an agreement is valid, and whereby she released and relinquished all her interest in his estate—Sec. 3154 of the Code of 1873 making such an agreement void.

Cited in Scharff v. Hayes, 132 Iowa 611, 110 N. W. 25, the court holding that the wife of an insolvent husband cannot, as against his creditors, acquire and retain a part of his real property in consideration of her joining him in a conveyance of other real estate.

Cited in Rice v. Nelson, 27 Iowa 153; Huston v. Seeley, 27 Iowa 198; Dunlap v. Thomas, 69 Iowa 361, 28 N. W. 638, not in point.

Overruled in Linton v. Crosby, 54 Iowa 479-481, 6 N. W. 727, holding that under Sec. 2203 of the Code of 1873, an agreement of separation between husband and wife, whereby they mutually agree to release the dower or other property rights each has in the other's property, is void *ab initio*: That the above section was intended to and does, abrogate the rule of the text.

Cross reference. See further on this question, annotations under Robertson v. Robertson (25 Iowa 350), ante. p. 277.

2. Husband and Wife—Note of Wife to Husband.—Under the Code of 1860, a note of a wife to her husband is unenforceable at law, pp. 585, 586.

Special cross reference. For cases citing the text, and many others in this connection, see annotations under Rule 2 of Jones v. Crosthwaite (17 Iowa 393), Vol. II, p. 546.

PHENY v. METCALF, 26 IOWA 597

(Abstract.)

1. Appeal—Imperfect Record—Bill of Exceptions—Affidavits or Papers Used Below, How Made Part of Record on Appeal.—On appeal to the Supreme Court the evidence introduced on the trial or motion [In this case a motion to remove a cause to the circuit court of the United States] must be embodied in a bill of exceptions properly certified by the trial judge. And where an affidavit or paper used below is sought to be used upon appeal, the record must show that it was filed and used below, or it must be embodied in the bill of exceptions, p. 597.

Reaffirmed in Ramsey v. Bush, 27 Iowa 18, holding that where the record upon appeal from an order granting a change of venue shows that certain affidavits were filed below, but it is not disclosed by bill of exceptions or otherwise whether the order was based upon them alone, the ruling of the lower court will be affirmed.

Annotations to Decisions Reported in Volume 27 Iowa

WILSON v. SEXON, 27 IOWA 15

1. Highway—Dedication of—Proof to Establish Dedication of.—A highway may derive its existence from the dedication of the land over which it passes, to the public use, by the owner of the soil, and the acceptance thereof by the public for such use.

The fact of dedication and the intention to dedicate may be proved by a writing, under or not under seal, or by parol, by facts and circumstances showing such intention, or by acts inconsistent with any other inference save of such intention.

One of such circumstances which will be considered evidence of dedication is the use of the highway by the public, with the knowledge and assent of the owner of the soil; and when such use extends through a long series of years, the *animus dedicandi* is presumed, p. 16.

Unreported citation, 133 N. W. 764.

Special cross reference. For further cases citing, sustaining and explaining the text, and numerous others on the question, see annotations under *Onstott v. Murray* (22 Iowa 457), ante. p. 56.

2. Highway—Obstruction of—Injunction.—Injunction lies upon the complaint of a person specially interested in or benefitted by a public highway to restrain its obstruction or to abate the obstruction after it has been done, pp. 15-17.

Special cross reference. For cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 2 of *Ewell v. Greenwood* (26 Iowa 377), ante. p. 342.

MOTE v. CHICAGO & NORTHWESTERN R. R. CO., 27 IOWA 22, 1 AM.
REP. 212

1. Common Carriers—Railroads—Liability for Loss of or Injury to Baggage—When Liability Terminates.—The liability of a railroad company as a common carrier for loss of or injury to baggage terminates upon the expiration of such a reasonable time after arriving at the destination as will enable the passenger to receive and take charge thereof.

In determining what will be a reasonable time, the customs of the railway and of the station, the manner of transporting baggage there-

from, and, in short, the peculiar circumstances surrounding each case, must be considered, p. 26.

Reaffirmed and explained in Hicks v. Wabash R. R. Co., 131 Iowa 297-299, 8 L. R. A. (New Series) 235, 108 N. W. 536, holding that a carrier of passengers is liable for baggage only when the baggage is checked and transported as incident to the transportation of a passenger: And that in respect to any goods, although such as might be baggage, transported for hire the liability of the common carrier as such terminates when the goods have reached their destination and are ready for delivery to the consignee; and that thereafter the carrier is warehouseman only, even though the consignee has received no notice of the arrival of the goods at their destination and has had no opportunity to take them away.

2. Warehouseman—Care Required and Liability of.—The obligation of a warehouseman is to take common and reasonable care of the property intrusted to his charge, and exercise toward it such diligence as men usually exert in respect to their own concerns. He is not liable for theft, unless it is the result of want of proper care, p. 27.

Reaffirmed and explained in Adix v. Ch. & N. W. Ry. Co., 150 Iowa 383, 130 N. W. 163, holding that the law requires a warehouseman to exercise reasonable care only, and, if he stores property with the care that would be used by a reasonably prudent man under the circumstances, he is not liable for loss: And he is not bound to provide a place of storage that is fire-proof.

3. Interest—Damages for Value of Goods Lost by Negligence of Warehouseman, Interest on.—In an action to recover the value of goods lost by the negligence of a warehouseman, where the value thereof is undisputed, the plaintiff, if successful, may—under Sec. 1787 of the Code of 1860—recover interest on the value of the goods from the date of the loss, pp. 27, 28.

Reaffirmed and explained in Robinson Bros. & Gifford v. Merchants' Despatch Transportation Co., 45 Iowa 476, holding that in an action for the value of goods received by a common carrier for transportation and lost by fire in transit, the plaintiff is entitled to interest on the value thereof at six per cent. per annum from the time the goods should have been delivered at their destination.

Reaffirmed and explained in Arthur v. Ch. R. I. & P. Ry. Co., 61 Iowa 652, 653, 17 N. W. 26, holding that in an action to recover the value of property destroyed by the negligence of defendant, the plaintiff is entitled to interest upon the value thereof, from the date of the destruction.

Reaffirmed and extended in Cobb, Blasdel & Co. v. I. C. R. R. Co., 38 Iowa 629, holding further that in an action against a railroad company for failure to transport and deliver grain, it is proper for the

court to instruct the jury that interest on the sums lost by plaintiff and recoverable by him, may be included in the verdict as an element of damages.

Reaffirmed and varied in Christie v. Iowa Life Ins. Co., 111 Iowa 182, 183, 82 N. W. 501, holding that in an action for money due under a contract, plaintiff is entitled to interest thereon from the time it became due and should have been paid as provided by the contract.

Distinguished and narrowed in Richmond v. Dubuque & Sioux City R. R. Co., 33 Iowa 502, holding that in an action for unliquidated damages for breach of contract, interest may be considered as an element of damage under the rule which permits its allowance in order to arrive at the sum which will be a just and lawful compensation for the injury sustained.

HANSON v. VERNON, 27 IOWA 28, 1 AM. REP. 215

I. Constitutional Law—Power of Legislature to Authorize County or Other Municipal Corporation to Tax to Aid in Construction of Railroad—Injunction.—The Legislature has no power to authorize a county or other municipal corporation to issue bonds, or levy a tax to aid in the construction of a railroad; and the collection of such a tax will be enjoined upon the complaint of a tax payer of the county or other municipal corporation. The Act of March 22, 1868, Chap. 48, Laws of 1868, authorizing aid to railroads, is unconstitutional, pp. 32, 35, 45, 58-60.

Cited in Renwick, Shaw & Crossett v. Dav. & N. W. Ry. Co., 47 Iowa 513, 514, (dissenting opinion), the majority court reaffirming the Rule of Stewart v. Board of Supervisors, below, which overrules the text, and upholding constitutionality of Chap. 123, Laws of 1874.

Cited in Pritchard v. Magoun, 109 Iowa 366, 46 L. R. A. 381, 80 N. W. 513, the court upholding the constitutionality of Chap. 13, Acts of 21 General Assembly (1886), as amended by Chap. 19, Acts of 25 General Assembly (1894), and Chap. 98, Acts of 21 General Assembly, authorizing cities and towns to vote a tax to aid in the construction of certain highway bridges owned by private persons or corporations.

Cited in Muscatine Western R. R. Co. v. Horton, 38 Iowa 48, the case involving and turning upon other points.

Cited in Koehler & Lange v. Hill, 60 Iowa 663 (dissenting opinion), 15 N. W. 639, the majority court opinion not in point.

Overruled in Stewart v. Board of Supervisors of Polk County, 30 Iowa 28-30 (cited in dissenting opinion, 36, 40, 41, 42, 48, 53, 54), 1 Am. Rep. 238, upholding the constitutional power of the General Assembly on this question, and holding that Chap. 102, Laws of 1870, authorizing municipal corporations to tax in aid of the construction of railroads, is constitutional.

Overruled in Bonnifield v. Bidwell, 32 Iowa 150, holding that the Act of the text is constitutional.

Cross reference. See further on this question, annotations under Rule 1 of State ex rel. B. & M. Riv. R. R. Co. v. Wapello County (13 Iowa 388), Vol. II, p. 165.

2. Taxes Defined.—Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes, or to accomplish some governmental end, pp. 46, 47.

Cited in State v. Mayor, and City Council of City of Des Moines, 103 Iowa 88, 64 Am. St. Rep. 157, 39 L. R. A. 285, 72 N. W. 643, the court holding that although the Legislature may delegate the taxing power to a municipal corporation, yet it cannot delegate such power to a board not directly empowered by and responsible to the people thereof.

Cited in Guthrie County v. Conrad, 133 Iowa 174, 110 N. W. 456, the court holding that taxes are the enforced proportional contributions from persons and property, levied by the State by virtue of its sovereignty, for the support of government and for all public needs. —The court holding that a father is liable—under Sec. 2297 of the Code of 1897—for the care of his insane minor son, who is incarcerated in the State hospital after being legally adjudged insane.

Cited in McSurely v. McGrew, 140 Iowa 177, 118 N. W. 421, not in point.

3. Eminent Domain—Constitutional Law—Condemnation of Private Property for Public Use—Powers of Legislature and of Courts.—*When* the public exigencies demand the exercise of the power of taking private property for the public, is solely a question for the Legislature, upon whose determination the courts cannot sit in judgment. But *what* constitutes such a public use as will justify the exercise of the power of eminent domain, is a question for the courts. And if a public use be declared by the Legislature, the courts will hold the use *public* unless it manifestly appears by the provisions of the Act, that they can have no tendency to advance and promote such public use, p. 50.

Special cross reference. For cases citing, sustaining and explaining the text, and many others, see annotations under Rule 2 of Bankhead v. Brown (25 Iowa 540), ante. p. 293.

PARTRIDGE & CO. v. HARROW, 27 IOWA 96, 99 AM. DEC. 643

1. Judgment—Clerical Misprision or Mistake of Clerk—When Action in Equity Lies to Correct—Effect of Affirmance of Judgment Upon Appeal.—Where, through no fault or negligence of the plaintiff, the clerk enters judgment for a sum less than that to which the plaintiff is entitled, and the plaintiff fails to discover the mistake within the year allowed by Sec. 3500 of the Code of 1860, for the

correction thereof by motion, he (plaintiff) may obtain the relief or the entry of judgment for the proper amount, by an action in equity. And this is the rule although the original judgment has been appealed and affirmed before the last action is commenced, pp. 98, 99.

Reaffirmed and explained in Barthell v. Roderick, 34 Iowa 519, 520, holding that a mistake in a judgment in an action at law, not the result of negligence of the party complaining or of his attorney, may be corrected by an action in equity: And that a mistake in a calculation of an attorney, whereby a judgment in an action on a promissory note is for too small a sum, may be so corrected: And that this is the rule although the original judgment has been satisfied before the commencement of the action in equity.

Reaffirmed and explained in Snyder v. Ives, 42 Iowa 162, 163, holding that where in an action for the foreclosure of a mortgage on several lots, the attorney for the plaintiff prepares and hands to the clerk, a decree containing a correct description of all of the lots, and the clerk by mistake omits one of the lots from the decree, as recorded, and the execution similarly omits it, but the appraisers appraise the property believing it contains *all the lots*, and the plaintiff becomes purchaser at the execution sale under the same belief, equity will, upon complaint of the plaintiff, purchaser, set aside the sale, correct the original decree, and order a resale according to the corrected decree and correct description—And this though the action in equity to correct and set aside, be commenced before the expiration of a year from the rendition of the original decree.

Reaffirmed and explained in Manning v. Nelson, 107 Iowa 39, 77 N. W. 504, holding that an erroneous judgment for costs cannot be set aside—under Sec. 3156 of the Code of 1873—upon motion after the expiration of a year from its rendition; but that if the error is discovered after that time, relief may be had in equity.

Cited in Young v. Tucker, 39 Iowa 600, the court holding that equity will set aside a judgment at law which was procured by fraud, where the relief cannot be granted by appeal, and the defrauded party is otherwise without redress.

Cited in Dist. Township of Newton v. White, 42 Iowa 613; Bond v. Epley, 48 Iowa 605; Larson v. Williams & Betender, 100 Iowa 117, 62 Am. St. Rep. 544, 69 N. W. 442, the court holding that equity will grant a new trial in an action at law, where the power of the court of law to so do has ceased, the judgment cannot be corrected upon appeal, and the applicant therefor states sufficient reasons why the motion was not made in the court of law in the proper time, and sets out equitable circumstances entitling him to relief.

Cited in Hawley v. Griffin et al, 121 Iowa 690, (concurring opinion), 92 N. W. 120, the majority court's opinion involving the vacation of a decree against an insane person.

Cited in Maynes v. Brockway, 55 Iowa 460, 8 N. W. 318, the case turning on another question.

Distinguished in McFaul v. Woodbury County, 57 Iowa 100, 10 N. W. 297, holding that plaintiff cannot maintain an action in equity to correct a judgment entered upon an indefinite verdict: That his remedy is by motion for the jury to reform their verdict, by motion to set aside the verdict and appeal in the original action.

Distinguished in Freeman v. Hart, 61 Iowa 527, 528, 16 N. W. 598, holding that any one against whom a judgment is legally entered has a right to move for a correction thereof; and if such a person has full knowledge of an error or mistake therein within a year from its rendition, he cannot maintain an action in equity to correct it, after the expiration of such period.

Distinguished in Benby v. Fie, and Cain, 106 Iowa 302, 76 N. W. 703, holding that equity will not entertain a bill to modify a decree because of a change of law after its entry.

Distinguished in Stewart Lumber Co. v. Downs et al, 142 Iowa 424, 425, 19 Am. & Eng. Ann. Cas., 1100, 120 N. W. 1068, holding that a judgment rendered for a larger amount than is due the judgment creditor cannot be challenged or corrected at the suit of a stranger thereto, unless it be shown that it was procured by the fraud and collusion of the judgment debtor and creditor.

DES MOINES VALLEY R. R. CO. v. GRAFF, 27 IOWA 99, 1 AM. REP. 256

1. **Contracts—Mutuality—Consideration—Subscription to Railroad.**—Where a party agrees to pay a certain sum of money to another upon the latter doing a particular act, or performing certain conditions, the agreement is binding upon the performance by the latter.

So where a person agrees to pay a certain sum to a railroad company upon its running its road through a certain town, the agreement is binding, upon the company complying with the condition, pp. 103, 104.

Reaffirmed and explained in First Nat'l Bank of Cedar Rapids v. Hendrie, 49 Iowa 404, 405, 31 Am. Rep. 153, holding that notes and contracts conditioned for the payment of money upon the completion of railroads to certain points, are not void as against public policy.

Reaffirmed, explained and varied in Bobzin v. Gould Balance Valve Co., 140 Iowa 748, 749, 118 N. W. 42, holding that any condition which may be legally performed by a corporation may be a condition of a subscription for stock: That a condition subsequent is a valid consideration for a stock subscription; and while it does not affect the subscriber's liability to take and pay for his stock, it gives him a right of action against the corporation for its failure to perform the condition: Hence holding that where certain citizens of a town subscribe to a certain sum of stock in a corporation upon condition that its principal place of business and office, shop and factory be located

in the town for a certain period, the removal thereof from such town during such period, will be enjoined, upon complaint of such stockholders.

Reaffirmed and extended in B. & M. R. R. Co. v. Penney, 38 Iowa 256, holding further that when a party agrees to pay a railroad company a certain sum upon its completing its road to a certain town by a certain date, and thereafter the subscriber agrees on the back of his subscription, that the railroad company may complete the road by a later named date, the last agreement is based upon a sufficient consideration, and the railroad company may enforce it, upon completing the road to the town by the later date.

ALLEN v. ROGERS, 27 IOWA 106

1. Judgment—Against Defendant not Served with Notice is Void—Setting Aside on Motion.—A judgment against one who has not been served with original notice, is void, and may be set aside on motion, pp. 107, 108.

Reaffirmed and explained in Spencer v. Berns, 114 Iowa 128, 86 N. W. 210, holding that a void judgment may be set aside on motion; and that where the defendant has been served with *no notice*, as distinguished from *irregular or defective* notice or its service, and does not enter his appearance to the action, the judgment therein is void.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Kitsmiller v. Kitchen (24 Iowa 163), ante. p. 158.

SCOTT'S ADMINISTRATORS v. COLE AND ALLEN, 27 IOWA 109

1. Costs—Judgment for Against Successful Party—Appeal—Affirmance, When.—While it is true as a rule that the successful party is entitled to recover his costs, this is not universally true, the court having the power under peculiar circumstances to adjudge otherwise. And where on appeal it is sought to reverse a judgment for costs against the successful party, the record must disclose the facts upon which the trial court acted, and his abuse of discretion, or that the lower court had no right or discretion—under the Code of 1860—to enter such a judgment, or it will be affirmed, pp. 109, 110.

Reaffirmed in Bush v. Yeoman, 30 Iowa 480.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

BATES v. BATES, 27 IOWA 110, 1 AM. REP. 260

1. Wills—Undue Influence—Mental Incapacity—Declarations of Testator Admissible to Prove.—Declarations of the testator,

whether made before or after the making of the will, are competent evidence to *show the mental incapacity of the testator, or that the will was procured by undue influence*, p. 114.

Reaffirmed and explained in Bever v. Spangler and Blake, 93 Iowa 604, 61 N. W. 1080; Manatt et al, v. Scott et al, 106 Iowa 211, 68 Am. St. Rep. 293, 76 N. W. 721, holding that mental disturbance may be detected by declarations as surely as by conduct, and hence the declarations of persons charged with insanity are admissible in a chain of logical connection to show the mental condition when the will was executed.

Reaffirmed and explained in In re Estate of Goldthorp, 94 Iowa 345, 346, 58 Am. St. Rep. 400, 62 N. W. 848, holding that declarations of the testator as set out in the text may not *in and of themselves* have any great weight, but they are proper to be considered in connection with other evidence, upon the question of undue influence.

Reaffirmed and extended in In re Perkins' Estate, 109 Iowa 217, 80 N. W. 335, holding further that where there has been evidence introduced, upon the trial of a will contest, tending to show mental incapacity of the testator, or undue influence exerted over him, testator's previous declarations are admissible in evidence in support of the will, showing dislike or affection for the natural objects of his bounty, or for those favored by him in the alleged will.

Reaffirmed and qualified in Stephenson v. Stephenson, 62 Iowa 166, 17 N. W. 457, holding that the declarations of a testator may be received, not as showing undue influence, but as showing the effect on his mind of whatever undue influence, if any, was exerted upon him to procure him to execute the will.

Reaffirmed and qualified in Muir, Adm'r, v. Miller, 72 Iowa 590, 34 N. W. 432, holding, however, that a prior declaration of a testator, of an intention contrary to the subsequent disposition by his will, cannot be shown to establish undue influence.

Distinguished and narrowed in Johnson v. Johnson, 134 Iowa 36, 37, 111 N. W. 432, holding that declarations of the testator may be received as indicating his state of affections or dislike for particular persons benefited or not benefited by the will, of his inclination to obey or resist persons alleged to have exerted the influence, and, in general, his mental or emotional condition with reference to his being affected or influenced by any of the persons concerned: But, as an account or recital of what in fact has occurred in the past, such evidence is no more than hearsay, and ought not to be received as tending to establish the fact related.

(Note.—See further, In re Townsend's Estate, 128 Iowa 621, 103 N. W. 984; In re Wiltsey's Estate, 122 Iowa 423, 98 N. W. 294; Denning v. Butcher, 91 Iowa 426, 59 N. W. 69; Sim v. Russell, 90 Iowa 656, 57 N. W. 601; Parsons v. Parsons, 66 Iowa 758, 21 N. W. 570; In re Hollingworth's Will, 58 Iowa 528, 12 N. W. 590; Dye v.

Young, 55 Iowa 435, 7 N. W. 678; In re Ames, 51 Iowa 596, 2 N. W. 408; Ross v. McQuiston, 45 Iowa 145, some important cases on this question, not citing the text.—Ed.)

Cross reference. See other rules hereof in this connection.

2. Wills—Insanity or Mental Incapacity—Presumption as to Sanity—Burden of Proof.—A will proved or admitted to have been executed and attested, as prescribed by law, will be presumed to have been made by a person of sound mind; but, if testimony is shown which counterbalances this presumption, the party seeking to support such will must establish, by affirmative evidence, that the testator was of sound mind when he executed it, pp. 114, 115.

Cited in Goldthorp v. Goldthorp, 115 Iowa 436, 88 N. W. 946, the court holding that when the attesting witnesses are offered to prove the will, and it seems to be executed in due form, this alone is generally sufficient where objections are made to the probate thereof: And that the burden of proving want of mental capacity and undue influence is, in such case, upon the contestant, and, as a general rule, the burden never shifts.

Overruled in Stephenson v. Stephenson, 62 Iowa 166, 167, 17 N. W. 457, 458, holding that the rule is *dictum*, and that the burden of the proof of insanity in the case of a will, equally with that of a deed or other contract, is upon the party alleging it, and who claims the benefit of the fact when established.

Cross reference. See further on this question, annotations under In re Will of Coffman (12 Iowa 491), Vol. II, p. 82.

3. Wills—Mental Weakness—Undue Influence—Evidence.—Nothing short of absolute imbecility or incompetency makes a will void; but if a testator had a weak mind, so as to be easily imposed upon and unduly influenced this is a material fact affecting the validity of his will; and if proof thereof be followed by proof of circumstances showing undue influence, the Will will be void, pp. 115, 116.

Reaffirmed in Seaward v. Carman, 78 Iowa 708, 43 N. W. 543.

Reaffirmed and explained in In re Will of Wiltsey, 135 Iowa 438, 109 N. W. 779, holding that in determining whether the will represents the uninfluenced judgment and purpose of testator, or whether it is the result of surrounding influences brought to bear upon him, his physical condition and mind as affected by illness may be taken into account.

Reaffirmed and extended in In re Will of Convey, 52 Iowa 200, 201, 2 N. W. 1087, holding further—as does the present case—that an instruction in a will contest that the jury should consider the provisions of the will, together with the testator's mental capacity, in determining the question of undue influence, is proper.

And see 152 Iowa 160.

4. Wills—Testamentary Capacity—What is.—A party competent to make a will should possess a mind capable of exercising judgment, reason and deliberation—a mind capable of weighing the consequences of his Will and its effect to a reasonable degree upon his estate and family, and all persons devoid of such Reason are incompetent to make a valid will, pp. 115, 116.

Reaffirmed in *In re Will of Convey*, 52 Iowa 200, 201, 2 N. W. 1087; *Meeker v. Meeker*, 74 Iowa 357, 358, 7 Am. St. Rep. 489, 37 N. W. 776; *Bever v. Spangler and Blake*, 93 Iowa 605, 61 N. W. 1081; *Manatt v. Scott*, 106 Iowa 215, 216, 68 Am. St. Rep. 293, 76 N. W. 721; *In re Evans' Estate* 114 Iowa 243, 244, 86 N. W. 284; *In re Will of Wiltsey*, 135 Iowa 438, 109 N. W. 779, all upholding instructions in will contests embodying substantially the law of the rule.

Cited in *Garretson v. Hubbard*, 110 Iowa 9, 81 N. W. 174, an action in equity to vacate a decree because of the alleged unsoundness of mind of the defendant; the court holding that a person of unsound mind is one who is incapable of transacting the particular business in hand; that he need not, necessarily be an insane or distracted person, and may be capable of transacting some kinds of business, and yet be of unsound mind, and incapable of transacting business of magnitude, or of, at least, some degree of intricacy; that he may be capable of understanding his rights as to some transaction and not others.

(Note.—There are other cases, sustaining, but not citing, the text.—Ed.)

STOCKWELL v. CARPENTER, 27 IOWA 119

1. Mechanic's or Materialman's Lien on Buildings—Priority Over Vendor's Lien for Purchase Price of Land.—Under Secs. 1846, 1853-1855 of the Code of 1860, a mechanic's or materialman's lien for labor done or materials furnished in the erection of a building on land, is superior to the vendor's lien for the purchase price of the land: And such building may be sold under a decree foreclosing the mechanic's or materialman's lien, and be removed from the land by the purchaser.

But the lien of the mechanic or materialman on the building is distinct from and does not affect the lien of the vendor on the land itself, p. 124.

Reaffirmed in *Jameson & Sons v. Gile*, 98 Iowa 493, 67 N. W. 397.

Reaffirmed and narrowed in *Tower v. Moore*, 104 Iowa 347-349, 73 N. W. 824, holding that Sec. 3317 of McClain's Code (Chap. 100, Laws of 16th General Assembly, Secs. 3088-3091 of the Code of 1897) gives to the holder of a mechanic's lien against an independent building a priority of right in every case where the court shall find as a fact that such building can be removed without material injury to the security of the earlier lienholder; but where no such finding is made, the land must be sold, and the purchase price applied first in payment of the prior incumbrance.

Distinguished and extended in Jones v. Osborne, 108 Iowa 413, 414, 79 N. W. 144, holding further that where the vendor of land agrees that the cost of a building erected by the purchaser on land sold by him take precedence of his claim for the purchase price, the mechanic or materialman erecting or furnishing material to be used in the erection thereof, has the superior lien.

2. Mechanic's or Materialman's Lien—Contract—Sufficiency of—"Owner," Who Considered—Purchaser in Possession of Land.—A purchaser of land who is in possession under a contract of purchase is an "owner" within the meaning of Secs. 1846 and 1866 of the Code of 1860, and may contract with a mechanic or materialman for the performance of labor or furnishing materials in the erection of a building or improvement of the realty.

Such contract with a mechanic or materialman need not contemplate or specially name every item of materials furnished, p. 125.

Reaffirmed as to first paragraph in Jameson & Sons v. Gile, 98 Iowa 493, 67 N. W. 397.

Reaffirmed as to second paragraph in Chase v. Garver Coal Co., 90 Iowa 27, 57 N. W. 649.

Cited as to second paragraph in Neilson, Benton & O'Donnel v. Iowa Eastern R. R. Co., 51 Iowa 186, 33 Am. Rep. 124, 1 N. W. 436, the court holding that the contract by the land owner with the mechanic or materialman provided by Sec. 1846 of the Code of 1860, may be either express or implied.

Cross references. See further on this question, annotations under Rule 1 of Jones v. Swan & Co. (21 Iowa 181), Vol. II, p. 890; Rule 2 of Monroe v. West (12 Iowa 119), Vol. II, p. 23.

STATE v. BRADY, 27 IOWA 126

1. Larceny—Possession of Stolen Property—When Sufficient to Authorize Conviction.—Proof of the possession of property recently stolen, is, if unexplained, sufficient to authorize a conviction for larceny, p. 128.

Special cross reference. For cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 2 of State v. Taylor (25 Iowa 273), ante. p. 265.

ILLEFF v. BRAZIL, 27 IOWA 131, 99 AM. DEC. 645

1. Partnership Property — What is Not — Joint Owners.—Where two farmers who are neighbors buy a threshing machine and give the seller their note for the purchase price, signed by each individually, they are joint owners of the machine, but not partners, pp. 132, 133.

Cited with approval in Dunham, Fletcher and Coleman v. Crawford, 130 Iowa 365, 106 N. W. 931, the case turning upon another point.

Distinguished and explained in Aultman & Co. v. Fuller, Williams & Co., 53 Iowa 61, 62, 4 N. W. 811, holding that where two persons buy a threshing machine under an agreement that they are to operate it for profit, each furnishing a proportion of the work, etc., and the profits and losses to be equally shared by them, they are partners, and the machine is partnership property.

Distinguished and explained in Heard v. Wilder, 81 Iowa 425, 46 N. W. 1076, holding that to constitute a partnership as between the parties, there must be a joint ownership of partnership funds according to the intention of the parties, and an agreement, either expressed or implied, to participate in the profits or losses of the business, either ratably or in some other proportion, to be fixed upon by the co-partners.

McHENRY v. COOPER, 27 IOWA 137

1. Mortgages on Land—Foreclosure and Sale under Senior—Redemption—Junior Whose Mortgage Debt is Satisfied Cannot Redeem.—A junior mortgagee of land whose debt has been satisfied cannot redeem from a sale under a senior mortgage, had in an action by the senior to foreclose to which he (the junior) was not a party, pp. 143, 145.

Reaffirmed, extended and varied in Rice v. Nelson, 27 Iowa 154, holding further that the right to redeem an estate from a lien or charge is based upon an interest in the redemptioner which will be prejudiced or affected if the right to redeem be denied: And that wherever the right to dower will be cut off by a valid tax sale if such sale be not redeemed from, this right to dower, though the dower has not been assigned or admeasured, will give the doweress or her assignee the right to redeem from the tax incumbrance or sale.

2. Mortgage—Effect of—Only a Lien—When Extinguished.—A mortgage is only a lien on the mortgaged property for the debt it secures; and the lien and rights thereunder are extinguished when the mortgagee pays or satisfies the debt, pp. 145, 146.

Special cross reference. For cases citing and reaffirming the text, and many others on this question, see annotations under Rule 2 of Newman v. De Lorimer (19 Iowa 244), Vol. II, p. 722.

RICE v. NELSON, 27 IOWA 148

1. Tax Sale of Land—Who May Redeem from.—Any right which in law or equity amounts to ownership in the land; any right of entry upon it, to its possession, or the enjoyment of any part of it

which can be deemed an estate, makes the person an owner so far as it is necessary to give him the right to redeem.

So a widow or her grantee of unassigned dower in her deceased husband's realty, may redeem the whole of the real estate from a tax sale, pp. 151, 152, 154.

Reaffirmed and qualified in Fair v. Brown, 40 Iowa 211; Manning v. Bonard, 87 Iowa 652, 54 N. W. 459; Lane v. Wright, 121 Iowa 377-379, 100 Am. St. Rep. 362, 96 N. W. 903; Gilman v. Heitmen, 137 Iowa 347, 348, 113 N. W. 936, holding that one holder of a lien on or interest in land cannot purchase at or redeem from a tax sale, or take an assignment of the tax title thereto, and deprive other lienholders or persons having an interest therein of their rights; but that such a transaction inures to the benefit of all of the parties interested.

Reaffirmed and qualified in Cowdry v. Cuthbert, 71 Iowa 734, 735, 29 N. W. 799, holding that it is the duty of a purchaser in possession of land under an executory contract of sale, to pay all taxes thereon, accruing after he takes possession, but he is not bound to pay taxes for a prior period: And that if the land is sold at a tax sale for taxes accruing before he took possession, it is his duty to redeem therefrom upon being served with the statutory notice; and that the amount which he pays to so redeem will be applied as a payment on the purchase price: But he cannot acquire such tax title, and hold thereunder adverse to his vendor.

Unreported citation, 125 N. W. 341.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others, see annotations under Rule 3 of Adams v. Beale (19 Iowa 61), Vol. II, p. 692; Rule 3 of Burton v. Hintrager (18 Iowa 348), Vol. II, p. 642.

2. Tax Sale of Land—Construction of Redemption Statutes.—Statutes providing for redemption from tax sales are to be given a liberal construction, p. 151.

Reaffirmed in Foster v. Bowman, 55 Iowa 243, 7 N. W. 515.

Reaffirmed and explained in Ashenfelter, trustee v. Seiling, and Schandemeer, 141 Iowa 515-518, 119 N. W. 985, holding, also, that unless the provisions of Secs. 1341 and 1441 of the Code of 1879, are strictly complied with, the right of a land owner to redeem from a tax sale thereof, is not cut off; that the provisions of such sections are mandatory and not directory.

Cross reference. See Rule 1 hereof and cross reference there found, in this connection.

3. Tax Sale of Land—Redemption from—What Sufficient—Effect.—Where one entitled to redeem land from a sale for taxes pays the money necessary for redemption to the proper officer, and receives a certificate of redemption which is believed by the party re-

deeming and the officer to be sufficient, the redemption is complete and the tax purchaser has no further rights under his certificate of sale, although the redemption certificate may insufficiently describe the land, pp. 152, 153.

Special cross reference. For cases citing the text, and others, see annotations under *Noble v. Bullis* (23 Iowa 559), ante. p. 134.

4. Dower—Action by Widow to Recover before Assignment or Admeasurement.—A widow may maintain an action to recover her dower in land of her deceased husband before it has been assigned or admeasured—This action being allowed by Chap. 144 of the Code of 1860, providing for actions for the recovery of real estate, p. 156.

Cited in *Huston v. Seeley*, 27 Iowa 198, not in point.

5. Limitation of Actions—Action by Widow or Her Assignee to Recover Dower—Assignment or Admeasurement of Dower.—Under Sec. 3605 of the Code of 1860, the statute of limitation does not commence to run against an action by a widow or her assignee of her dower, to recover possession thereof, until the heir, tenant in possession, or other person claiming an adverse right or interest in the land, either denies the dower interest, or does some act equivalent to such denial.

But an action by a widow to admeasure or have dower assigned is barred unless commenced within ten years after the death of the husband, pp. 157-160.

Reaffirmed in *Sully v. Nebergall*, 30 Iowa 342, being an action in equity by a grantee of a widow, to recover a dower interest in land.—The court holding that the limitation of ten years from the husband's death applies only to proceedings in the county court.

Reaffirmed as to first paragraph in *Felch v. Finch*, 52 Iowa 564, 3 N. W. 571.

Special cross reference. For further cases citing and narrowing the text, and others on the question, see annotations under Rule 1 of *Starry v. Starry* (21 Iowa 254), Vol. II, p. 899.

ELDRIDGE v. KUEHL, 27 IOWA 160

(Later Appeal, 30 Iowa 275.)

1. Tax Sale of Land—On What Days May be Made—Recitals in Tax Deed Concerning—Sufficiency of—Presumption of Regularity of a Tax Sale.—A tax deed which recites that the land was sold for the taxes on the first Monday in December is not void by reason of the sale not being made at a time authorized by law, unless it is shown that the sale was made contrary to the provisions of Sec. 776 of the Code of 1860. Although Sec. 763 of the Code of 1860 provides that all sales of land for taxes shall be made on the first Monday in October, yet Sec. 776 thereof provides that under certain conditions such sales may be made on the first Monday of the next

succeeding month in which they can be made; and when a tax deed shows on its face that it was made on the first Monday of a succeeding month, it will be presumed, unless the contrary be shown, that the sale was as provided and allowed by Sec. 776, above mentioned, pp. 169, 170.

Reaffirmed and explained in Sully v. Kuehl, 30 Iowa 277, 278; Love v. Welch, 33 Iowa 193, 194; Easton v. Savery, 44 Iowa 659; Bullis v. Marsh, 56 Iowa 750, 2 N. W. 580, holding that under Sec. 784 of the Code of 1860, a tax deed such as set out in the text is, at least, *prima facie* evidence that all the requisites of the law as to the *time and manner* of sale, were complied with.

2. Tax Sale of Land—Sale of Several Parcels in Gross—When Allowed—Presumption of Validity of Tax Deed.—Where land is properly and legally assessed for taxation *in a body*, instead of in parcels, it may be sold for taxes in gross. And where a tax deed to land shows on its face that eighty acres were sold in gross, it will be presumed, until the contrary is shown, that it was legally assessed in a body, and therefore legally so sold, p. 170.

Reaffirmed in Bulkley v. Callanan, 32 Iowa 463, 464.

3. Tax Deed to Land—What Prima Facie Evidence of—Tax Deed as Evidence of Title.—Under the Code of 1860 (Sec. 784) a tax deed is evidence of the regularity of all proceedings in relation to the tax title anterior to its execution; and one claiming thereunder may introduce it in evidence without preliminary proof of the regularity of the assessment and proceedings concerning the tax sale, pp. 170, 171.

Reaffirmed and explained in Rima v. Cowan, 31 Iowa 127, holding that under the Code of 1860, a tax deed to land is *conclusive* as to the *manner* of the sale; and that when two such deeds recite that separate parcels of land, separately assessed, were sold separately, such recitals cannot be impeached by showing that the parcels were *in fact* sold in gross.

Special cross reference. For further cases citing, sustaining and explaining the text, and others, see annotations under Rule 1 of Allen v. Armstrong (16 Iowa 508), Vol. II, p. 465.

4. Tax Sale of Land—Error or Irregularity, etc., in Assessment—Effect on Sale—Illegal and Improper Taxes—Effect.—Under Sec. 753 of the Code of 1860, no irregularity, error or omission in the assessment shall affect in any manner, the legality of the taxes levied thereon, or the right or title of any real property sold for the non-payment of taxes.

And Sec. 762 of that Code, provides for the correction of illegal taxes, and, also, that a sale for any such shall not affect the title conveyed by the treasurer's deed, provided any portion of the taxes for which the land was sold, was legal, pp. 172, 173.

Reaffirmed in Sully v. Kuehl, 30 Iowa 276; Rhodes v. Sexton & Son, 33 Iowa 541; Genther v. Fuller, 36 Iowa 606, 607; Corning Town Co. v. Davis, 44 Iowa 633.

Reaffirmed as to first paragraph in C. R. & M. R. R. Co. v. Carroll County, 41 Iowa 174; Peirce v. Weare, 41 Iowa 381.

Reaffirmed as to second paragraph in Hurley v. Powell, Levy & Co., 31 Iowa 66, holding that the fact that land is sold for taxes for two years, and the taxes for one of the years had been paid before the sale, does not affect the validity thereof.

Reaffirmed and explained in Parker v. Sexton & Son, 29 Iowa 424, holding that so long as the power and right to sell exists as to any part of the taxes, the owner is not prejudiced by the erroneous or illegal part, since his property would be sold for the valid part, and he is entitled to have the erroneous portion refunded.—The court holding that the sections of the text, are constitutional.

Reaffirmed and explained as to second paragraph in Madson v. Sexton, 37 Iowa 563, holding that where taxes were properly levied for four of the years for which the land was delinquent and sold, the fact that the records show no levy for one year for which the land was sold, does not invalidate the sale.

Cited in McCready v. Sexton & Son, 29 Iowa 401 (dissenting opinion), 4 Am. Rep. 214, the majority court opinion turning on other questions.

Distinguished in Lathrop v. Irwin, 96 Iowa 716, 717, 65 N. W. 973, holding that where the owner of land seeks to set aside a sale and tax deed thereof and thereto, because the land was not assessed and valued of the year for which it was sold, he must prove that none of the officers charged with the duty of assessing and valuing (by both the Codes of 1860 and 1873) did their duty in reference thereto, or it will be presumed to have been assessed and valued by some one of them as required by law.

5. Tax Sales of Several Parcels of Land—Purchaser Preventing Competition Bid—What Proof of Will not Invalidate Sale—Rights of Subsequent Bona Fide Purchaser.—Where land is sold for taxes and other tracts are sold on the same day, the fact that the purchaser prevented competition with him by other bidders present in reference to many pieces of land bid for by him, will not invalidate the sale of the first mentioned tract, when it is not shown that the purchaser prevented competitive bidding as to it particularly.

Whether such a fact, even if connected with the particular tract for which the sale is sought to be set aside, would avail to invalidate the sale as against a subsequent *bona fide* purchaser, for value and without notice, is questionable, and is not determined, pp. 171, 172.

Reaffirmed as to first paragraph in Sully v. Poorbaugh, 45 Iowa 454.

Distinguished in Kerwer v. Allen, 31 Iowa 579-581, holding that where, at a sale of many pieces of land for taxes, the bidders form themselves into a ring and take turns in bidding, and ask whose turn it is to bid, and the person designated then bids for the tract of land being offered, such facts vitiate all sales of land thereat, even though it be not shown that a particular purchaser entered into any previous agreement or arrangement in relation thereto.

6. Tax Sale of Land—When Title Vests in Purchaser—Limitation of Actions.—Under Sec. 785 of the Code of 1860, the title to land sold for taxes vests in the tax sale purchaser, when the tax deed is *executed and recorded* in the proper record of titles; and the statute of limitation (five years) prescribed by Sec. 790 of that Code commences to run against the owner of the land sold and for its recovery, from that time, and not from the date of sale, pp. 173, 174, 177.

Reaffirmed in McCready v. Sexton & Son, 29 Iowa 374, 4 Am. Rep. 214; Hurley v. Street, 29 Iowa 432; Jeffrey v. Brokaw, 35 Iowa 506.

Reaffirmed and explained in Innes v. Drexel, 78 Iowa 254, 43 N. W. 201, holding that—under Sec. 790 of the Code of 1860, and Sec. 902 of the Code of 1873, corresponding thereto—the statute of limitation begins to run against a purchaser at a tax sale at the time when he might obtain a deed; that is, three years after the date of sale; and after five years from the time it begins to run, not only is the tax title extinguished, but all rights which are dependent upon it.

Reaffirmed and extended in Henderson v. Oliver, 28 Iowa 20, 21, holding further that the rule applies to an action in equity by the owner of land, to set aside a tax sale and deed thereof and thereto.

Reaffirmed and extended in Thomas v. Stickle, 32 Iowa 77; Douglass v. Tullock, 34 Iowa 263, holding further that the rule is applicable to an action involving a tax purchaser's title to land, or his assignee or grantee, when the action is commenced more than five years after the execution and recording of the tax deed: And this, although the tax deed shows on its face, that several tracts of land were sold for taxes in a lump for a gross sum: Holding, also, that the statute of limitation mentioned in the text is one of repose, and it was the manifest intention of the Legislature to cure all such irregularities in the *mode or manner* of sale, etc., which, within the five years' limitation, might render the sale invalid.

Reaffirmed and extended in Hintrager v. Hennessy, 46 Iowa 601-603; Thornton v. Jones, 47 Iowa 398, 399; Griffith's Ex'r, v. Carter 64 Iowa 195-198, 19 N. W. 904, 905, holding further that under Sec. 690 of the Code of 1860, and Sec. 902 of the Code of 1873, a tax purchaser's right to maintain an action for the recovery of land purchased at a tax sale, is barred after the expiration of five years

from the time which he is entitled to demand and receive a tax deed thereto.

Reaffirmed and extended in Barrett v. Love, 48 Iowa 106, 107; Griffith's Ex'r, v. Carter, 64 Iowa 195-198, 19 N. W. 904, 905, holding further that the statute and rule of the text applies to actions for the recovery of real estate sold for taxes, instituted either by the owner or the tax sale purchaser.

Reaffirmed and varied in Atkins v. Paige, 50 Iowa 667, 668, holding that an action to foreclose a right of redemption of land from a sale for city taxes does not—under Chap. 105, Acts of 7th General Assembly, and Sec. 506 of the Code of 1851—commence to run, until three years and six months from the day of sale; as under such laws, no tax deed could be executed until three years from the day of sale, and no such action could be maintained until six months after the execution thereof.

Distinguished in Stevens v. Casady, 59 Iowa 114, 115, 12 N. W. 803, holding that where land owned by a person under no disability, is sold for taxes, it must be redeemed within three years from the date of sale; and this period will not be extended in favor of a minor (married woman or a lunatic) who thereafter acquires the title, either by conveyance or by descent from the owner of the land at the time it is sold.

Distinguished in Blair v. Hemphill, 111 Iowa 228, 229, 82 N. W. 502, holding that an action in equity is maintainable by the owner of land against any person claiming a lien upon or interest therein, to quiet title thereto.

Distinguished and narrowed in Pearson v. Robinson, 44 Iowa 416, holding that if a tax sale of land has in all respects been regularly conducted and the preceding steps been properly taken, so that the owner of the land is entitled to his right to redeem, he must exercise that right before the expiration of the time limited by statute, whether a deed has been executed or not.

Distinguished and narrowed in Slyfield v. Barnum, 71 Iowa 246, 247, 32 N. W. 271, holding that as long as the right in the owner of the land sold for taxes to redeem therefrom exists, there is no completed sale, and the limitation prescribed by Sec. 902 of the Code of 1873—corresponding to the section of the text—does not begin to run: And that until the owner of the land in whose name it is taxed is given the notice prescribed by Sec. 894 of the Code of 1873, the right to redeem is not cut off, even though a tax deed for the land be executed and recorded.

(Note.—See further, Bowers v. Hallock, 71 Iowa 218, 32 N. W. 268; Trulock v. Bentley, 67 Iowa 602, 25 N. W. 824; Brown & Sully v. Painter, 38 Iowa 456, some important cases in this connection, not citing the text.—Ed.)

Cross references. See further on this question, annotations under Rule 2 of *Williams v. Heath* (22 Iowa 519), ante. p. 64.

See, also, in this connection, annotations under Rules 2-4 of *Adams v. Beale* (19 Iowa 61), Vol. II, p. 692; *Burton v. Hintrager* (18 Iowa 348), Vol. II, p. 642.

7. Tax Sale of Land—Rights of Tax Purchaser under Certificate, or His Assignee.—The striking off of real estate to the highest bidder at a sale for taxes, and the giving to him a certificate of purchase thereof, does not invest him with any *title to or interest in* such real estate, but simply a lien upon it for the taxes, interest, costs, penalties, etc.

Such a certificate is assignable under Sec. 778 of the Code of 1860, and the assignee has the same rights as the original tax purchaser, p. 174.

Reaffirmed in *Harrington v. Valley Sav. Bank*, 119 Iowa, 313, 93 N. W. 347.

Reaffirmed in *Watson v. Phelps*, 40 Iowa 483, under Sec. 888 of the Code of 1873, corresponding to Sec. 778 of the Code of 1860.

Reaffirmed and explained as to first paragraph in *Rice v. Bates*, 68 Iowa 395, 396, 27 N. W. 287, holding that the purchaser of lands at a tax sale acquires no right or interest in the land until he receives a deed therefor; that while the property is subject to redemption he has but a chattel interest: Hence holding that a tax purchaser cannot convey land for which he holds a tax certificate, and thereby transfer his rights and interest to the grantee.

Cross reference. See Rule 6 hereof, in this connection.

8. Statutes—Construction of—Statute Borrowed from Foreign State—Authoritative Value of Such State's Decisions Construing.—Where a statute is borrowed or adopted from a statute of another state by the Legislature of this one, the construction of it by the courts of the foreign state will, also, be adopted by the courts of this state in construing the one enacted here, p. 176.

Reaffirmed and narrowed in *Jamison v. Burton*, 43 Iowa 285; *Barrett v. Love*, 48 Iowa 107, holding that the construction by another state of a statute of that state enacted here, will be followed, only when consistent with the spirit and policy of our laws.

SIMBERSKY v. SMITH, 27 IOWA 177

1. Supreme and General Term Courts—Appeals to—Act of 1868, Construed—To What Orders and Judgments it Applies.—Secs. 17 and 18 of Chap. 86, Acts of 1868, entitled an "Act establishing circuit and General Term courts," and the sections mentioned relating to appeals, apply exclusively to judgments and orders rendered and entered after that Act went into operation; and as to these, appeals

must be taken to the General Term, and within the three months allowed by Section 18.

Judgments rendered anterior to the time when the Act of 1868 went into force are not affected thereby, and an appeal therefrom lies directly to the Supreme Court, and such appeal may be taken at any time within one year from the date of the judgment appealed from, p. 179.

Cited with approval in City of Davenport v. D. & St. P. R. R. Co., 37 Iowa 626, the court holding that Sec. 3165 of the Code of 1873, allowing appeals from orders dissolving injunctions made by a judge does not apply to such an order so made before the taking effect of the section or statute: That courts will construe all statutes as having only a prospective operation, unless the Legislature expressly declares or otherwise shows a clear intent that it shall have a retroactive effect.

Cited with approval in Richardson v. Fitzgerald, 132 Iowa 256, 109 N. W. 867, the court holding that where the successful party upon the trial of an issue of fact in an equitable action failed to file his transcript of evidence *in writing* within the six months allowed therefor by Sec. 3652 of the Code of 1897, and in order to justify a trial *de novo* upon appeal to the Supreme Court as therein provided, the subsequent passage of Chap. 155, Acts of 31st General Assembly, (1906), relating to the filing of shorthand notes of evidence in such case and amending such section, does not apply to or give the unsuccessful party a right to perfect the record by such means, or render shorthand notes previously filed effective for such purpose.

BLAIR & BRONSON v. DUBUQUE COUNTY, 27 IOWA 181

1. Intoxicating Liquors—Prohibitory Liquor Law—Liability of County for Compensation to Attorney for Prosecuting Offenses against—Who May so Employ Attorney for County—Peace Officers, Who Are.—A county is not liable for the services of an attorney in prosecuting offenses against the prohibitory liquor law, when such services were rendered upon the request or appointment of one not a peace officer. Under Sec. 1578 of the Code of 1860, only a peace officer may appoint an attorney to prosecute such an offense, and bind the county to compensation for services rendered.

Under Sec. 4440 of the Code of 1860, "peace officers" are sheriffs, and their deputies, constables, marshals and policemen of incorporated cities and towns, pp. 182, 183.

Reaffirmed and extended in Foster & Foster v. Clinton County, 51 Iowa 546, 547, 2 N. W. 210, holding further—under Secs. 3829 and 4109 of the Code of 1873, corresponding to the sections of the text—that one appointed by a justice of the peace, special constable *for the purpose of assisting peace officers*, of a certain town, *to seize liquors*, is not a peace officer who may employ an attorney to prosecute

offenses against the prohibitory liquor law, and bind the county to compensation for such services.

(Note.—See, *Patlock & Wilson v. Louisa County*, 46 Iowa 138; *Rice v. Plymouth County*, 43 Iowa 136; *Clark & Grant v. Lyon County*, 37 Iowa 469; *Clark v. City of Des Moines*, 19 Iowa 199, some important cases in this connection, not citing the text.—Ed.)

Cross references. See further in this connection, annotations under Rule 1 of *Clark v. City of Des Moines* (19 Iowa 199), Vol. II, p. 715; *Estep v. Keokuk County* (18 Iowa 199), Vol. II, p. 612.

HUSTON v. SEELEY, 27 IOWA 183

1. Conveyances—Constructive Notice—Sufficiency of Index Entry.—Where an index entry of a recorded mortgage or deed of trust on or to land sufficiently describes the record, and would put a prudent person upon inquiry, a subsequent purchaser or incumbrancer is constructively notified of the facts the record would disclose, p. 191.

Reaffirmed in *Loser, Ex'r, v. Plainfield Sav. Bank*, 149 Iowa 681-684, 128 N. W. 1105, 1106.

Distinguished in *Thomas v. Desney*, 57 Iowa 62, 10 N. W. 317, holding that if a party is not charged with constructive notice by what appears in the index book, he is not bound to look further, and therefore is not bound by what appears of record.

Cross references. See further on this question, annotations and cross references under *Noyes, Adm'r, v. Horr* (13 Iowa 570), Vol. II, p. 189; Rule 1 of *English v. Waples* (13 Iowa 57), Vol. II, p. 118.

2. Mortgage on or Deed of Trust to Land—Sale Under—Right of Redemption, Nature of.—The right of redemption is founded upon an interest in the real estate mortgaged, or to which there is a deed of trust, which interest will be prejudiced or affected if the redemption right is denied, p. 194.

Reaffirmed in *Rice v. Nelson*, 27 Iowa 154; *Foster v. Young*, 35 Iowa 39.

3. Dower—Sale and Conveyance of Dower Interest in Land before Assignment or Admeasurement of—Effect in Equity.—Equity will recognize and enforce a sale and conveyance of the dower interest before the dower has been assigned or admeasured.

And so equity will uphold a sale of land of a wife under a decree of foreclosure of a mortgage in which both the husband and wife joined, although the sale be made after the death of the wife; and the dower interest of the husband therein, though unassigned or not admeasured will be divested.

Under the Code of 1860, the dower rights of both husband and wife are made equal, pp. 197-200.

Reaffirmed and explained in *Herr v. Herr*, 90 Iowa 541, 58 N. W. 898, holding that a widow may sell, assign, convey, or mortgage

her dower interest in her deceased husband's land, before it has been assigned or admeasured, and equity will uphold the transaction or instrument.

Cited in Rice v. Nelson, 27 Iowa 153, the court holding that an unassigned right of dower is an interest in or pertaining to real estate; that it is an interest which, in equity at least, may be transferred; and that the right of the assignee of the widow will be respected and protected by the courts: And holding that wherever the right to dower will be cut off by a valid tax sale if such sale be not redeemed from, this right to dower, though the dower has not been assigned or admeasured, will give the doweress or her assignee, the right to redeem from the tax incumbrance or sale.

Cited in Rausch v. Moore, 48 Iowa 616, (dissenting opinion), 30 Am. Rep. 412, the majority court opinion holding—as does the present case in argument—that the dower interest of a widow in the land of her deceased husband, and which is unassigned, is not, either under the Common Law or under Chap. 151, Acts of 1862 (this Act changing the dower interest from a life estate to a fee simple title), subject to execution or attachment in an action at law by the widow's creditor.

Distinguished in Hook v. Garfield Coal Co., 112 Iowa 219, 83 N. W. 966, holding that a lessee of coal land and mining rights under a lease from a widow who has only an unassigned interest therein, has no right to mine coal from *the whole tract* of land, or from mines opened by the lessee, or from mines abandoned by the husband before his death.

(Note.—See further, Larkin v. McManus, 81 Iowa 723, 45 N. W. 1061; McKee v. Reynolds, 26 Iowa 578, important cases in this connection, not citing the text.—Ed.)

4. Deed of Trust to Land by Wife—Failure of Husband to Join in—Effect.—Where a wife executes a deed of trust to her land, and her husband does not join therein, it does not divest the latter of his inchoate dower therein; and the subsequent death of the wife, and sale of the land under the trust deed is of no effect as to such interest of the husband, pp. 195-199.

Cited in Lucas v. Bennett, 42 Iowa 706 (abstract), the court holding that a general assignment for the benefit of creditors of all the debtor's property does not pass to the assignee, the debtor's inchoate right of dower in his wife's realty.

5. Dower—Action to Recover Possession of—Damages, Rents and Profits, when Recoverable.—In an action by a widow or her assignee to recover dower, the plaintiff cannot recover damages for the detention thereof, or rents and profits, except from the time a demand of possession was made on the defendant.

In such an action for the recovery of dower which has never been assigned or admeasured, and where the petition does not pray for the assignment or admeasurement, no such damages, rents, etc., are recoverable, p. 202.

Reaffirmed and explained in Felch v. Finch, 52 Iowa 567, 3 N. W. 573, holding that a widow cannot recover damages, or rent for withholding her dower, until demand be made for its assignment: Holding, however, that one in possession of a widow's unassigned dower, must pay the taxes thereon.

Cited in In re Pennock's Estate, 122 Iowa 627, 98 N. W. 481, the court holding that a widow cannot sue an administrator for rents of her distributive share in her deceased husband's realty, until such share has been set aside to her.

ALMAN, MILLER & CO. v. PHOENIX INS. CO., 27 IOWA 203, 1 AM. REP. 262

1. Insurance Companies—Local Agent—When Is Considered General Agent—Power to Bind Company.—A local agent of an insurance company with power to issue and renew policies, assent to assignments or transfers thereof, and do such other matters in relation to his agency as empowered by the company, is to be considered a general agent, and the company is bound by his acts which are within the scope of his general authority, though in violation of a limitation thereon which is not brought to the knowledge of a party dealing with him, pp. 205-207.

Reaffirmed and explained in Williams v. Niagara Fire Ins. Co., 50 Iowa 568, holding that where an agent of a fire insurance company has power to countersign and issue policies, accept risks offered him and receive premiums therefor, and insures a house knowing that it is unoccupied, the company is bound by his act, and the policy is valid.

Special cross reference. For further cases citing the text, and many others on the question, see annotations under Rules 3-5 of Vile v. Germania Ins. Co. (26 Iowa 9), ante. p. 298.

HOY v. ALLEN, 27 IOWA 208

1. Judgment Lien on Land—Prior Unrecorded Deed Superior to.—A judgment lien on land is inferior to the rights of the grantee in a prior, unrecorded deed thereto; and this is true although the deed is without proper acknowledgment, p. 209.

Reaffirmed in First Nat'l Bank of Tama City v. Hayzlett, 40 Iowa 659.

Reaffirmed and extended in Sigworth v. Merriam, 66 Iowa 480, 24 N. W. 5, holding further that the lien of an unrecorded mortgage on land is superior to that of a judgment subsequently rendered.

Reaffirmed and qualified in Koch v. West, 118 Iowa 472, 96 Am. St. Rep. 394, 92 N. W. 664, holding that where there is a sale of land under a judgment, to a person other than the execution plaintiff, and for value paid and without notice of a prior unrecorded deed or mortgage to or on the land, such purchaser takes it free from any right or claim of the prior grantee or mortgagee.

(Note.—There are numerous cases, sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations and cross references under Rules 2 & 3 of Evans v. McGlassen (18 Iowa 150), Vol. II, p. 601.

STATE v. HUTCHINSON, 27 IOWA 212

1. Change of Venue in Criminal Cases—Discretion of Trial Court—Abuse—Reversal on Appeal.—The trial court is vested with a sound judicial discretion in deciding upon a motion for a change of venue in criminal cases, and he is to rule thereon according to the very Right of it: And his ruling thereon will not be ground for reversal, unless it is clearly shown that such discretion was abused, pp. 213, 214.

Reaffirmed in State v. Bevans, 37 Iowa 180.

Cross reference. See further on this question, annotations under Rule 2 of State v. Ingalls and King (17 Iowa 8), Vol. II, p. 480

DOUGLASS v. BISHOP, 27 IOWA 214

1. Mortgage on Land—Action to Foreclose—Redemption by Purchaser of Part of Land—Who Is Not a Party—Amount to Be Paid by.—A purchaser of part of land which is mortgaged and who is not made a party to an action to foreclose the mortgage, may maintain an action to redeem from a sale under a decree in the foreclosure action: But such purchaser must redeem the whole of the land mortgaged and by payment of the whole of the mortgage debt, p. 216.

Reaffirmed and explained in Barrett v. Blackmar, 47 Iowa 571, holding that in equity the right of a purchaser from a mortgagor and who is not made a party to the foreclosure, is to redeem from the mortgage: And that the party bringing his action to redeem is entitled to rents and profits, and, under some circumstances, he is chargeable with valuable and lasting improvements.

Reaffirmed, explained and extended in Spurgin v. Adamson, 62 Iowa 665, 667, 18 N. W. 295, holding that a senior mortgagee, or his assignee in possession of mortgaged land, either before foreclosure or under a foreclosure sale or deed made thereon, must, upon redemption by a junior incumbrancer, account for rents and profits, and, in a proper case, be credited for improvements made by him on the land—The rule applying equally to a purchaser at the decretal sale

of foreclosure of the senior mortgage: And holding further that in an action to redeem, by a junior incumbrancer against a senior mortgagee or his assignee or a purchaser at the senior's decretal sale, the plaintiff need not tender the amount of the senior's debt, interest and costs, when he prays for rents and profits, asks for an accounting and pleads that he is ready and willing to pay a balance found.

Cross references. See further in this connection, annotations under Knowles v. Rablin and Corwith (20 Iowa 101), Vol. II, p. 784; Johnson v. Harmon (19 Iowa 56), Vol. II, p. 691; Street v. Beal and Hyatt (16 Iowa 68), Vol. II, p. 408.

2. Pleadings—Practice—Irrelevant and Redundant Matter—How Reached.—Irrelevant or redundant matter in a pleading must—under Sec. 2946 of the Code of 1860—be reached by a motion to strike, and cannot be reached by demurrer, p. 217.

Reaffirmed in In re Estate of McMurray, 107 Iowa 650, 78 N. W. 691; Seaton v. Grim, 110 Iowa 147, 148, 81 N. W. 225, under Sec. 3618 of the Code of 1897.

Unreported citation, 77 N. W. 861.

(Note.—There are many cases under the various codes, sustaining, but not citing, the text.—Ed.)

DAVIDSON v. FOLLETT, 27 IOWA 217, 99 AM. DEC. 648

1. Estoppel in Pais—Holder of Liens Failing to Disclose.—Where the owner of land calls on a person holding various incumbrances thereon for a statement of all such claims, and the latter produces certain ones and states that *they are all*, which the owner accordingly settles in full, the holder of such claims and incumbrances is thereafter estopped from claiming a lien on such land existent and held by him at the time of the settlement, pp. 219, 220.

Special cross reference. For cases citing and explaining the text, and many others, see annotations under Hall v. Doran & Baker (13 Iowa 368), Vol. II, p. 163.

GRAY v. BEAN, 27 IOWA 221

1. Seduction—Action of—Damages for—Instructions.—In an action for damages by an unmarried female for her seduction, where the evidence shows that the plaintiff had given birth to a child, the following instruction is not improper, to-wit: "If you find that the plaintiff was seduced by the defendant, and that she was of previous chaste character, in estimating her damages, you will consider, first, loss of time by plaintiff; the expenses incurred for medical attendance, if any, and board while sick, and the like; second, physical suffering; third, the mental anguish, loss of character and social standing, and sense of shame caused by the seduction. The damage should be commensurate with the injury, but you must take care and not let your

sympathy lead you to an unjust or oppressive assessment." And this is the rule although there is no proof of how many days' loss of time was occasioned by plaintiff's sickness, or how much she expended for medical attendance, etc., pp. 223, 224.

See 148 Iowa 655, reaffirming the text.

Unreported citation, 127 N. W. 981.

ROBERTS v. CASS, 27 IOWA 225

1. Actions—Practice—Report of Referee—Necessity of Exceptions to Before Review upon Appeal.—Where no exceptions are filed to the report of a referee in the court below, errors in his findings of law and facts will not be reviewed by the Supreme Court.

And this is the rule where, by order of court, a referee's report is filed and judgment is entered thereon in vacation, the report showing that this is done by consent of parties, pp. 225, 226.

Reaffirmed in Bander v. Hinckley, 60 Iowa 186, 14 N. W. 229; *In re* Estate of Malvin, 93 Iowa 173, 61 N. W. 421.

Reaffirmed and explained in Young v. Scoville, 99 Iowa 181, 182, 68 N. W. 671, holding that to secure a review of the findings and conclusions of a referee in a law action, exceptions must be taken to the rulings of the district court thereon; and that exceptions taken before the referee are not sufficient; and that where there is a reference there are, in effect, two trials, and when an appeal is taken it is from the order and judgment of the trial court, and not from the conclusions of the referee: That upon appeal in such case a certificate from the trial judge is necessary to identify the evidence upon which he acted.

Distinguished in Michael v. Longman, 42 Iowa 485, 486, holding that where parties agree that either is to have thirty days from the coming in of the report of a referee in which to file exceptions thereto, and thereafter the cause is continued generally, and during vacation and without consent or agreement of parties, the referee files his report, the thirty days to file exceptions is to be computed from the first day of the next term of court, and not from the time the report is filed in vacation.

Distinguished in Dicken v. Morgan, 59 Iowa 158, 159, 13 N. W. 57, holding that—under the Code of 1873—no exception need be taken to a decree in an equitable action in order to authorize a trial *de novo* upon appeal.

And see 149 Iowa 629, 129 N. W. 61.

(Note.—See further, Teague v. Fortsch, 98 Iowa 92, 66 N. W. 1056; Feister v. Kent, 91 Iowa 1, 60 N. W. 495; Bolton v. Kitsman, 80 Iowa 343, 45 N. W. 876; Hodgin v. Toler, 70 Iowa 21, 30 N. W. 1; Porter v. Everett, 66 Iowa 278, 23 N. W. 668; Hobart v. Hobart, 45 Iowa 501; Washington County v. Jones, 45 Iowa 262; Edwards v. Cottrell, 43 Iowa 94; Belzor v. Logan, 32 Iowa 322, some important cases in this connection, not citing the text.—Ed.)

DIVELY v. CITY OF CEDAR FALLS, 27 IOWA 227

1. Trial—General and Special Verdict—Failure of Jury to Answer Question Submitted for Special Finding—Effect—New Trial.—The failure of the jury to answer a specific interrogatory submitted to them for a special finding, will not be ground for a new trial, where, without it answered, the general verdict and judgment thereon is proper, pp. 231, 232.

Reaffirmed and explained in Sutherland v. Standard Life & Accid. Ins. Co., 87 Iowa 513, 54 N. W. 456, holding that the failure of the jury to return a special finding will not necessitate a reversal, unless, because of the failure, it is manifest from the record that the jury has not found the necessary facts to authorize its general verdict.

Distinguished and narrowed in Darling v. West, 51 Iowa 263, 264, 1 N. W. 535, holding that where a jury fails to answer interrogatories submitted for special finding and which are material and necessary to the general verdict, a motion for a new trial on this ground will be sustained.

And see 152 Iowa 445.

Unreported citation, 132 N. W. 876.

Cross reference. See further on this question, annotations under Rules 1 & 2 of Hardin v. Branner (25 Iowa 364), ante. p. 278.

2. Constitutional Law—Municipal Corporations—Limitation on Corporate Indebtedness—City Having Money in Treasury to Pay Debt Incurred—Effect.—Where a city has money in the treasury to pay a debt incurred and which is in excess of that allowed by Sec. 3, Art. 11, of the Constitution of 1857, the contract creating the debt is valid; it not being considered a *debt* within the meaning of the constitutional prohibition.

Where a city contracts for an indebtedness to be paid in installments for a certain number of years, the indebtedness of the city is to be estimated as the amount to be paid each year, and not the whole amount of the debt, pp. 232, 233.

Reaffirmed and explained as to first paragraph in City of Council Bluffs v. Stewart, 51 Iowa 395, 396, 1 N. W. 636, holding that uncollected taxes and the levy for the current year cannot be deducted from the out-standing indebtedness of a city, for the purpose of ascertaining the real indebtedness.

Reaffirmed and explained as to first paragraph in Tuttle v. Polk & Hubbell, 92 Iowa 438, 439, 60 N. W. 735, holding that a municipal corporation may assume an obligation to pay money, without incurring a debt, in a constitutional sense, if payment can and is to be made from the current revenues: And that a city may make paving contracts for the paving of streets, and agree to impose and collect assessments against abutting lot-owners, and, if collectible, to pay in certificates to the contractor or other person entitled thereto; this not being regarded

as a debt of the city, as the contractor or other holder of the certificates must assert his liens on the abutting lots.

Reaffirmed and extended in Swanson v. City of Ottumwa, 118 Iowa 172, 173, 179, 185, 186, 59 L. R. A. 620, 91 N. W. 1054, holding further that if a city enters into a contract for an extraordinary expenditure within the scope of its power, and under express statutory authority, provides a special or extraordinary fund, either by tax contemporaneously levied for that purpose alone and for the full amount, or by some "fixed and definite plan" of special taxation extending over a period of years, the receipt of such revenue is "legally certain," and subject to appropriation in advance of its actual collection, without the incurring of an indebtedness.

Cited with approval in Anderson v. Orient Fire Ins. Co., 88 Iowa 595, 55 N. W. 353, the court holding that bonds issued by a city in payment of or as evidencing a debt, incurred in excess of the constitutional limit of indebtedness, are *void*.

Cited in Grant v. City of Davenport, 36 Iowa 404, the court holding that where the contract made by the municipal corporation pertains to its ordinary expenses and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute "the incurring of indebtedness" within the meaning of the constitutional provisions.

Cited in Thompson v. Dist. of Allison, 102 Iowa 98, 70 N. W. 1094, the court holding that where bonds are issued for an authorized and an unauthorized indebtedness of a municipal corporation, and the former can be readily distinguished and severed from the latter, judgment for the amount of the former may be rendered—But see and compare, Anderson v. Orient F. Ins. Co., 88 Iowa 579, 55 N. W. 353.

Cited in Allen v. City of Davenport, 107 Iowa 106, 77 N. W. 537, the court holding that a contract made by a city and bonds issued for and in excess of the constitutional indebtedness, are illegal and void.

Cited in Halsey & Co. v. City of Belle Plaine, 128 Iowa 471, 104 N. W. 495, the court holding that the constitutional limitation of the text is to be estimated upon the "actual value of the taxable property" of a municipal corporation, and not on its value as assessed; and that Sec. 1305 of the Code of 1897, does not change this rule.

Distinguished in Scott v. City of Davenport, 34 Iowa 212-214, holding that a city has no power to issue bonds for an amount in excess of its constitutional limitation of indebtedness, for the purpose of erecting a water-works system to be owned, controlled and operated by the city—But see, Grant v. City of Davenport, 36 Iowa 404, 405, (citing the text), holding that the provision of Chap. 78, Laws of 1872, in reference to the power of cities to levy a special tax for the constructing and maintaining water-works, that it shall not "be levied upon the taxable property of said city which lies wholly without

the limits of the benefit or protection of such works," is constitutional—And see *Burlington Water Co. v. Woodward*, 49 Iowa 61-65, (citing the text), holding that under Sec. 471-475 of the Code of 1873 (the law mentioned by the Grant Case) a city may contract with a private corporation for the latter to erect, maintain and operate a water-works system, the company to float bonds, for the purpose, payable in a given time, such bonds and taxes and expenses of the company to be paid out of the "water fund" and a special tax of five mills on the dollar per year on the taxable property of the city: Although the bonds so issued and indebtedness incurred by the company be in excess of the city's constitutional limitation of indebtedness; as the city is only bound to the extent of the special tax and the water fund

Distinguished and narrowed in *Windsor v. City of Des Moines*, 110 Iowa 188, 189, 192, 193, 80 Am. St. Rep. 280, 81 N. W. 480, holding that a city cannot enter into a contract for the expenditure of money in excess of the limitation of indebtedness provided by the Constitution, for the erection of an electric light plant; and cannot anticipate its ordinary and general future revenues for the payment thereof: And holding that *the second paragraph of the text is dictum*.

McMARTIN v. BINGHAM, 27 IOWA 234, 1 AM. REP. 265

1. Actions—Practice—Reference without Consent of Parties—Action at Law on Account—Right to Jury Trial.—In an action at law upon an account, when the action is not of equitable cognizance, the court cannot—under Sec. 3090 of the Code of 1860—without the consent of the parties, refer the cause to a referee. In such an action the defendant is entitled to have the issue tried by jury, pp. 236, 239.

Reaffirmed in *Dist. Township of Grant v. Bulles*, 69 Iowa 526, 29 N. W. 440, under the Code of 1873.

Reaffirmed and extended in *Tufts v. Norris*, 115 Iowa 252, 253, 88 N. W. 368, holding further that where an equitable defense is pleaded to a law action, while that issue may be tried by the court, the right of plaintiff to a jury trial on the case he presents is not affected.

Reaffirmed and qualified in *Blair Town Lot & Land Co. v. Walker*, 50 Iowa 380-382, holding that when an action at law comes within the purview of Sec. 3090 of the Code of 1860, or Sec. 2816 of the Code of 1873, corresponding thereto, the court should not hesitate to refer it to a referee without the consent of the parties; as in such cases no right to a jury trial exists: And holding further that where the issue in an action at law involves complex and difficult calculations in order to ascertain the amount due by one or the other of the parties, it is proper to refer the cause to a referee, even without the consent or over the objection of one of the parties; as in this last case, the action is of equitable cognizance.

Reaffirmed and qualified in Burt v. Harrah, Adm'r, 65 Iowa 644, 645, 22 N. W. 911, holding that where in an action at law, the issue involves mutual demands or accounts of the parties, or where the accounts between the parties are lengthy and complicated, the case involves matters of equitable cognizance, and an order of reference to a referee may be made, without the consent or over the objection of either or both of the parties.

Cross reference. See Rule 2 hereof.

2. Equity Jurisdiction—Account.—Courts of equity have a general jurisdiction where there are mutual accounts, and also where the accounts are on one side, but a discovery is sought and is material to the relief. But where the accounts are all on one side, or where there is a single matter on the one side and mere set-offs on the other and no discovery is sought or required, courts of equity have not jurisdiction.

In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction, pp. 236-238.

Reaffirmed in Blair Town Lot & Land Co. v. Walker, 50 Iowa 380-382 (cited in dissenting opinion); Burt v. Harrah, Adm'r, 65 Iowa 645, 22 N. W. 911; Citizens' Bank v. Whinery Bros., 110 Iowa 392, 81 N. W. 695; Frick v. Habaker, 116 Iowa 504, 90 N. W. 501; Faville, Rec'r, v. Lloyd, et al, 140 Iowa 506, 507, 118 N. W. 873, all applying the rule under different states of fact.

Reaffirmed and narrowed in Galusha v. Wendt, 114 Iowa 616, 87 N. W. 518, holding that the mere intricacy, in an action at law for the recovery of a sum of money, of the calculations necessary to the determination of the amount of plaintiff's recovery will not justify the trial court in treating the case as one of equitable cognizance, and denying a jury trial.

Cited in Tuttle v. Bisbee, 144 Iowa 61 (dissenting opinion), 120 N. W. 702, the court holding that equity will intervene to effect a set-off, only when under the strict rules of the law justice cannot be effectuated.

Unreported citation, 29 N. W. 811.

3. Actions—Order Referring to Referee in Law Action—Appeal from.—An appeal lies to the Supreme Court from an order referring a law action to a referee, pp. 235, 239.

Cited in Brown v. Harper, 54 Iowa 548, 6 N. W. 748, the court holding that—under Sec. 3163, 3164 of the Code of 1873, an appeal lies to the Supreme Court from an order of the district court recom-

mitting a matter or cause to arbitrators as allowed by Sec. 3427 of that Code.

TWOGOOD v. FRANKLIN, 27 IOWA 239

1. Execution Sale of Land Pending Appeal—Purchase by Execution Plaintiff or His Attorney—Bona Fide Purchaser.—A purchase of land at a sheriff's sale by the plaintiff in execution or his attorney, with actual knowledge of a pending appeal, is at the peril of the purchaser, and the party or his attorney thus buying is not, within the meaning of Sec. 3541 of the Code of 1860, a *bona fide* purchaser, p. 244.

Reaffirmed and extended in Munson v. Plummer, 58 Iowa 737, 13 N. W. 72, holding further that where land is sold to the plaintiff under execution, pending appeal to the Supreme Court, and for an amount less than the plaintiff's judgment, upon the Supreme Court reducing the amount of the judgment, the plaintiff may, under Secs. 3198, 3199 of the Code of 1873, upon the remanding of the cause to the lower court, have the sale set aside upon his motion and the property restored to the defendant.

Reaffirmed and varied in English v. Otis, 125 Iowa 560, 561 101 N. W. 295, holding that—under Sec. 3796 of the Code of 1897—when the court sets aside a judgment by default, upon application made therefor within the time allowed by statute, he may, also, set aside and cancel a title to land derived through a sheriff's sale under the judgment, by the plaintiff in execution or his attorney or a purchaser of the certificate of sale from either of them.

Cited in Merritt v. Grover, 57 Iowa 496, 10 N. W. 880, the court holding that where land is levied on under an execution, and before the return day thereof, and after such date the judgment creditor, without having the first execution returned, or seeing that it is done, causes a second execution to be issued on his judgment, a sale under this latter, at which the judgment creditor becomes purchaser, will be set aside in an action therefor by the judgment debtor, or land owner—Section 3025 of the Code of 1873, providing that but one execution shall be in existence at the same time, and it being the judgment creditor's duty to see that this provision is pursued.

Distinguished and narrowed in Frazier v. Crafts, 40 Iowa 112-114, holding that a judgment debtor whose real estate has been sold to the judgment plaintiff in satisfaction of the judgment, before notice of appeal, cannot, after the judgment under which the sale occurred has been reversed, and the cause has been remanded for a new trial, and after the sheriff's deed to the judgment plaintiff has been recorded, sell the real estate to a third party and convey a valid title thereto, notwithstanding judgment is again rendered on a new trial for the full amount of the former judgment.

Cross reference. See further on this question, annotations under Hanschild, Adm'r. v. Stafford (27 Iowa 301), *Infra*. p. 405.

ROBERTSON v. ELDORA RAILROAD & COAL CO., 27 IOWA 245

1. Railroads—Condemnation of Right of Way—Appeal to District Court—Requisites—Notice—Bond—Filing of Papers—Waiver of Defective Service of Notice.—Upon appeal to the district court from an assessment of damages to land by a sheriff's jury for a right of way of a railroad, the service of notice on the opposite party is—under Sec. 1317 of the Code of 1860—sufficient to give the district court jurisdiction.

Upon such an appeal by the land owner the fact that the notice of the appeal was not served on the proper officer of the railroad company is—under Sec. 2840 of the Code of 1860—waived by the appearance of the company to object to such defective or improper service.

In such case no bond is necessary in order to perfect the appeal, or, even if one be required, the failure to file it will not operate to dismiss the appeal; as the district court may require one to be filed.

The failure of the sheriff to file the papers in the district court until the first day of the next term after the appeal was taken, is not cause for a dismissal of the appeal, pp. 246-248.

Cited in Bremer County Bank v. Bremer County, 42 Iowa 397, the court holding that an appeal to the circuit court, under Sec. 831 of the Code of 1860, from the action of a city board of equalization in the correcting or increasing the assessment of property, is to be perfected by notice: And that in such case the circuit court may require a bond if the proceedings are sought to be stayed.

Cited in Mentzer v. Davis, 109 Iowa 530, 80 N. W. 558, the court holding that upon appeal to the district court in an election contest, no bond is required—under Sec. 1222 of the Code of 1897—unless a stay of proceedings is sought.

Cited in Frost v. Board of Review of Oskaloosa, 114 Iowa 105, 86 N. W. 214, the court holding that upon an appeal to the district court from a decision of an inferior tribunal, the papers and record, or a transcript thereof, on which the latter acted, must be filed in the district court, or the appeal will be dismissed.

Cited in Simons v. M. C. & Ft. Dodge R. R. Co., 128 Iowa 146, 148, 103 N. W. 132, the court holding that an appeal to the district court in a proceeding to condemn land for a right of way of a railroad is—under Sec. 2009 of the Code of 1897—perfected by the service of notice on the adverse party and the sheriff; and that from that time until final disposition, the case is in the district court; and that a transcript of the proceedings, etc., before the sheriff need not be filed until the case is reached for trial; and that in such an instance if the case is docketed in the district court without the payment of the docket fee and without the filing of the transcript, the statute is sufficiently complied with: And holding further that a general appearance by

each of the parties and agreements from time to time as to the disposition of the case, which agreements were entered upon the proper records of the court, amounted to a waiver of an entry of the case upon the appearance docket.

Overruled as to second paragraph in *Spurrier v. Wirtner*, 48 Iowa 487, 488. holding that Sec. 960 of the Code of 1873, specifically provides how an appeal is to be taken to the district court from the assessment of damages in the establishment or changing of a highway; that thereunder notice of appeal must be served upon the county auditor and the applicant for damages, where the appeal is taken by the adverse party: And that the appearance in such case of such applicant, for the mere purpose of moving to dismiss, upon the ground that the notice was not served within the statutory period, does not waive such objection or enter appearance for other purposes, and the appeal should be dismissed when the notice is not so given.

WILLIAMS v. HAINES, 27 IOWA 251, 1 AM. REP. 268

1. Written Contracts—Want of Consideration—Conflict of Laws—Lex Fori—Constitutional Law—Remedial Statutes.—Under Chap. 76 of the Code of 1860, the want or failure, in whole or in part, of the consideration of a written contract even under seal, may be shown as a defense in an action thereon; and this applies to a contract executed in a foreign state and sought to be enforced in a court hereof.

Such statute relates to the remedy, and does not impair the obligation of contracts as inhibited by the Constitution of the United States, pp. 253, 254.

Cited in *Nelson v. Nederland Life Ins. Co.*, 110 Iowa 604, 81 N. W. 808; *Rauen, Adm'r, v. Prudential Ins. Co.*, 129 Iowa 730, 106 N. W. 200, the court holding that in an action in this state on a foreign contract, the laws of this State relating to the remedy and procedure, control.

(Note.—See further, *Dorr Cattle Co. v. Des Moines Nat'l Bank*, 127 Iowa 153, 4 Am. & Eng. Ann. Cas. 519, 98 N. W. 918; *Burk v. Putnam*, 113 Iowa 234, 86 Am. St. Rep. 372, 84 N. W. 1053; *Allerton v. Monona Co.*, 111 Iowa 560, 82 N. W. 922; *Jones v. German Ins. Co.*, 110 Iowa 75, 46 L. R. A. 860, 81 N. W. 188; *Scottish Union & Nat'l Ins. Co. v. Herriott*, 109 Iowa 606, 77 Am. St. Rep. 548, 80 N. W. 665; *B. C. R. & N. Ry. Co., v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477, 12 L. R. A. 436, 48 N. W. 98; *McLane v. Brown*, 70 Iowa 752, 30 N. W. 478; *Kossuth County v. Wallace*, 60 Iowa 508, 15 N. W. 305; *Wood v. Brolliar*, 40 Iowa 594; *Wormley v. Hamburg*, 40 Iowa 22; *Parsons v. Carey*, 28 Iowa 436; *Inghram v. Dooley*, *Morris* 29; *Ballard v. Ridgley*, *Morris* 27, some important cases in this connection, not citing the text.—Ed.)

Cross references. See further in this connection, Von Baumbach v. Bade, 76 Am. Dec. 283; O. Water-works v. Oshkosh, 95 Am. St. Rep. 870; Insurance Co. v. Pollard, 64 Am. St. Rep. 715, 36 L. R. A. 271; Mack v. De Graff, 63 Am. St. Rep. 729; Heaton v. Eldredge, 60 Am. St. Rep. 737, 36 L. R. A. 817; Railroad Co. v. McCann, 56 Am. St. Rep. 695, 31 L. R. A. 651; Emery v. Burbank, 47 Am. St. Rep. 456, 28 L. R. A. 57; Corbin v. Bank, 24 Am. St. Rep. 673; Hunt v. Jones, 34 Am. Rep. 635; Downer v. Chesebrough, 4 Am. Rep. 29.

MCKENZIE v. KITLER, 27 IOWA 254

1. Evidence—Admissions and Declarations of Administrator—Sec. 2393 of the Code of 1860, Construed.—In an action wherein an administrator is a party, his admissions and declarations are admissible in evidence against him. Sec. 2393 of the Code of 1860, has no application to such a case, p. 256.

Reaffirmed in Schmid, Adm'r, v. Kreismer, Adm'x, 31 Iowa 480.

2. Appeal—Bills of Exceptions—Insufficient Certificate.—A bill of exceptions certified as containing *the substance* of the evidence below will not be considered upon appeal, or authorize a review of any error involving the evidence. A bill of exceptions must be certified as containing *all of the evidence* introduced upon the trial below. p. 256.

Reaffirmed in Davis & Atlee v. Card, 33 Iowa 593 (abstract); Walker v. Beaver, 50 Iowa 506, 507.

Reaffirmed and explained in Hubbard v. Epperson, 40 Iowa 409, holding that a bill of exceptions certified as containing "all the material evidence produced in the cause," is insufficient to authorize a reversal because the judgment is not supported by the evidence.

Reaffirmed and explained in McMeans v. Cameron, 51 Iowa 690, 691, 2 N. W. 540, holding that an abstract of evidence upon appeal to the Supreme Court purporting to contain "all the evidence bearing upon and introduced to sustain the issues and findings as to which the plaintiff appealed," is insufficient to authorize a review of any question involving the evidence.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross references. See further on this question, annotations under Lea v. Roads, (22 Iowa 408), ante. p. 48; Rule 1 of Burlington Gas Light Co. v. Green, Thomas & Co. (21 Iowa 335), Vol. II, p. 912, and cross references there found.

PRIDE v. WORMWOOD, 27 IOWA 257

1. Pleadings—Amendments—Discretion of Trial Court—Abuse—Reversal for.—Under the Code of 1860, the trial court may at any time within his sound judicial discretion, and in furtherance of justice,

permit an amendment to a pleading to be filed, upon such terms as to costs, etc., as the court may require; and the rule is *to allow* and the exception *to refuse to allow* the filing thereof.

The trial court's ruling on such a question will not be ground for reversal except in case of manifest abuse of such discretion and resulting prejudice to the substantial rights of the party appealing and complaining, pp. 260-262.

Reaffirmed in Emmerson & Co. v. Converse, 106 Iowa 331, 76 N. W. 705, under the Code of 1873.

Reaffirmed and explained in O'Connell v. Cotter, 44 Iowa 50-52, holding that a party may, after judgment and in furtherance of justice, amend his pleading to conform to the proof; and that it is proper for plaintiff, after judgment, to amend his petition by adding to the prayer therein—The court saying that "An amendment after judgment is within the sound judicial discretion of the court, and no general rule applicable to all cases can be laid down, etc."

Reaffirmed and explained in Davis v. Ch. R. I. & P. Ry. Co., 83 Iowa 745 (abstract), 49 N. W. 78, holding that—under Secs. 2686, 2689 of the Code of 1873—an amendment may be allowed in furtherance of justice and to conform to the proof, after verdict and judgment.

Reaffirmed and extended in Little v. Pottawattamie County, 127 Iowa 380-382, 101 N. W. 754, holding further that where plaintiff sues a county for injuries resulting from his falling through a bridge without, prior to the commencement of the action, service of notice as provided by Sec. 3528 of the Code of 1897, and before the proper authorities had acted on the claim, he should be allowed to file a supplemental petition, upon the proper terms, setting out the refusal by the board as provided by the Code—But see and compare Zalesky v. Home Ins. Co., 102 Iowa 617-623, 71 N. W. 568.

Reaffirmed and extended in Hanson v. Cline, 142 Iowa 189, 118 N. W. 755, holding further that although a party has no absolute right to file an amendment without leave of court, it should not be stricken on motion, if it is one which should have been allowed had leave to file been asked.

(Note.—There are numerous cases under the various codes, sustaining, but not citing the text.—Ed.)

Cross references. See further on this question, annotations under City of Davenport v. Mitchell (15 Iowa 194), Vol. II, p. 324; Seevers, Adm'r, v. Hamilton (11 Iowa 66), Vol. I, p. 773.

STATE v. SCHILL, 27 IOWA 263

1. **Perjury—False Testimony before Grand Jury—Sufficiency of Averments.**—In an indictment for perjury in giving false testimony before the grand jury it is necessary to state that the testimony was given before the grand jury, on what matter it was given and

the testimony must be stated with particularity, as well as its falsity and materiality; but it is not necessary to allege that the party charged with the offense under investigation by the grand jury was or was not guilty thereof, nor the facts constituting such offense, and that the person accused was guilty thereof, pp. 267, 269.

Reaffirmed in State v. Perry, 117 Iowa 466, 467, 91 N. W. 766; State v. Booth, 121 Iowa 710, 711, 97 N. W. 75, being cases of indictments for perjury in false testimony before a justice of the peace and a police court, upon preliminary examinations.

Unreported citation, 88 N. W. 345.

GROSVENER v. HENRY, 27 IOWA 269

1. Landlord and Tenant—Forcible Entry and Detainer—Notice to Quit—Tenant at Will—Person in Possession of Land under Contract for Certain Period, or to Labor.—When a person is in possession of land under a contract to expire at a given time, upon the expiration of the period, the landlord may—under Secs. 2218, 3952, 3955 of the Code of 1860—institute forcible entry and detainer proceedings after giving the person in possession three days notice to quit. And the same rule applies to a tenant in possession of land under an agreement with the landlord that the tenancy was to terminate upon the tenant ceasing to work for his landlord; and upon the tenant ceasing to so labor, the landlord may institute such proceeding, after giving the tenant three days notice to quit. Such persons are not tenants at will, pp. 272, 273.

Reaffirmed in Kellogg v. Groves, 53 Iowa 396, 5 N. W. 518; Shuver v. Klinkenberg, 67 Iowa 546, 25 N. W. 771, under the Code of 1873.

STATE v. DOWE, 27 IOWA 273, 1 AM. REP. 271

1. Criminal Law—False Pretenses, Obtaining Money or Property by—Sufficiency of Proof to Establish—False Promise.—In order to constitute the crime of obtaining money or property by false pretenses, as denounced by Sec. 4394 of the Code of 1860, there must be a pretense, a representation in fact, that is false, and it must have been relied upon by and defrauded a party. A false promise *alone* by accused will not sustain an indictment for such crime. But the fact that a promise is combined with the false pretense does not take away the criminal character of the act. If the pretense and promise blend together and jointly act upon the defrauded person, whereby he is induced to give faith to the pretense, the case is within the statute, p. 275.

Reaffirmed in State v. Tripp, 113 Iowa 702, 84 N. W. 547, under Sec. 5041 of the Code of 1897, corresponding to the section of the text.

Reaffirmed and explained in State v. Seligman, 127 Iowa 417, 418, 103 N. W. 358, holding that—under Sec. 5041 of the Code of

1897, corresponding to the section of the text—a false pretense is a false and fraudulent representation or statement of a fact as existing or having taken place, made with knowledge of its falsity, with intent to deceive and defraud, and which is adapted to induce the person to whom it is made to part with something of value.

(Note.—See further, *State v. Grant*, 86 Iowa 217, 53 N. W. 120; *State v. Fooks*, 65 Iowa 196, 21 N. W. 561; *State v. Montgomery*, 56 Iowa 195, 9 N. W. 120; *State v. Joaquin*, 43 Iowa 132, some important cases on this question, not citing the text.—Ed.)

HUNTINGDON *v.* FISHER, 27 IOWA 276

1. Contracts—Contract or Promise Made for Benefit of Third Person—Right of Such Person to Sue on.—Where a contract, obligation or valid promise or agreement, is entered into which is in part for the benefit of a third person who is not a party thereto, the latter may sue thereon, p. 278.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under *Rice v. Savery* (22 Iowa 470), ante. p. 58; and see, also, cross references there found.

STEWART *v.* CHICAGO & NORTHWESTERN R. R. Co., 27 IOWA 282

1. Railroads—Liability for Killing Stock—Swine Running at Large Contrary to County Regulation.—A railroad company is liable absolutely, under Chap. 169, Acts of 1862, for killing a hog on its track at any place where it has a right to but does not fence, although the hog, at the time it is killed, is running at large contrary to a county regulation; and the owner's merely permitting it to so run at large, does not, of itself, constitute such negligence, or willful act, occasioning the killing as will preclude his recovery, p. 284.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Rule 1 of *Spence v. Ch. & N. W. Ry. Co.* (25 Iowa 139), ante. p. 247.

2. Railroads—Lessee of Railroad—Liability for Killing Swine as in Rule 1.—Under Chap. 79, Acts of 1868, the liability of a railroad company for killing a hog under the circumstances set out in Rule 1 hereof, applies equally to the lessee of a railroad, pp. 284-286.

Reaffirmed and narrowed in *Stephens v. D. & St. P. R. R. Co.*, 36 Iowa 328-330, holding that a railroad company which has constructed and is actually operating a railroad is not liable for the killing or injuring stock at a place where it has a right to but does not fence, by another company which is, also, using the road; but that in such case each company is liable severally for the killing or injuring stock done by them.

Cross reference. See Rule 1 hereof, in this connection.

STUCKSLEGER v. SMITH, 27 IOWA 286

1. Promissory Note—Action on—Pleading—Answer—Insufficient Denial of Indebtedness—Demurrer.—In an action on a promissory note, where the defendant in his answer denies that he is indebted to the amount claimed in the petition, but does not deny that plaintiff is entitled to judgment for a less or other sum, the pleading raises no issue of fact, and a demurrer thereto is properly sustained, pp. 287, 288.

Reaffirmed and explained in Callanan v. Williams, 71 Iowa 364, 32 N. W. 384, holding that a denial in an answer that the defendants are indebted in the amount claimed in the petition does not present an issue of fact, and does not amount to a general denial.

And see 149 Iowa 221, 128 N. W. 396.

Cross reference. See further on this question, annotations under Mann v. Howe (9 Iowa 546), Vol. I, p. 624.

HANSCHILD, ADM'R, v. STAFFORD, 27 IOWA 301

1. Judgment—Reversal—Restoration of Property or Its Value—When not Allowed—Procedure.—Where pending appeal to the Supreme Court on which the judgment is not superseded or stayed, property is sold under execution and another than the plaintiff becomes purchaser, and the proceeds of the sale has been paid by order of court to another than plaintiff, or when the property involved in the judgment has otherwise passed to an innocent purchaser, the defendant cannot, upon reversal of the judgment and adjudication by the Supreme Court that he is entitled to the property, or some part thereof, have an execution or writ of restitution issue in the Supreme or District Court under Sec. 3540 of the Code of 1860, for the purpose of restoring his property or the value thereof.

In such cases the party must be limited to his remedy by that proceeding wherein he can have all necessary parties brought before the court, and the rights of all adequately protected, while the full measure of relief is granted to him, pp. 302, 303.

Reaffirmed and explained in Zimmerman v. Nat'l Bank of Winterset, 56 Iowa 134, 135, 8 N. W. 808, holding that where personal property (in this case grain) is sold under execution pending appeal on which the judgment is not superseded, and the party in whose favor the judgment was rendered becomes purchaser and takes possession of the property, the adverse party may, upon reversal of the judgment by the Supreme Court and adjudication in his favor, maintain an action against the former or party, purchaser, for the value of the property, sounding in damages for unlawful conversion and retention, and without demand for the restoration of the property: And that Sec. 3198 of the Code of 1873, corresponding to the section of the text, provides only a cumulative remedy, and does not exclude the above right of action.

Reaffirmed and explained in Munson v. Plummer, 58 Iowa 737, 13 N. W. 72, holding that where land is sold to the plaintiff under execution, pending appeal to the Supreme Court, and for an amount less than the plaintiff's judgment, upon the Supreme Court reducing the amount of the judgment the plaintiff may, under Secs. 3198, 3199 of the Code of 1873, upon the remanding of the cause to the lower court, have the sale set aside upon his motion, and the property restored to the defendant.

Reaffirmed and explained in Schoonover v. Osborne, 117 Iowa 433-435, 90 N. W. 846, holding—under Sec. 4145 of the Code of 1897, corresponding to the section of the text—that a party obtaining through a judgment before its being reversed, any advantage or benefit, must restore what he got to the other party after reversal.

Reaffirmed and extended in Chambliss, Adm'r, v. Hass, Adm'r, 125 Iowa 490-492, 3 Am. & Eng. Ann. Cas. 16, 68 L. R. A. 126, 101 N. W. 155, holding further that the collection of a judgment after its affirmance and under execution, either by levy and sale or by payment by the defendant to prevent this, does not defeat the defendant's right to obtain a new trial within the time allowed by statute therefor, and a restoration of the money or property satisfying the judgment, upon the new trial being granted.

(Note.—See further, Manning v. Poling, 114 Iowa 20, 83 N. W. 895; Heath v. Halfhill, 106 Iowa 131, 76 N. W. 522; Weaver v. Stacy, 93 Iowa 683, 62 N. W. 22; Fort Madison Lumber Co. v. Batavian Bank, 77 Iowa 393, 42 N. W. 331; Burrows v. Stryker, 45 Iowa 700; Frazier v. Crafts, 40 Iowa 110; Grim v. Semple, 39 Iowa 570, some important cases on and in connection with this question, not citing the text.—Ed.)

Cross references. See further on this question, annotations under Twogood v. Franklin (27 Iowa 239), ante. p. 398. See, also, in this connection, Reynolds v. Harris, 76 Am. Dec. 459; McJilton v. Love, 54 Am. Dec. 449; Flemings v. Ruddick's Ex'r, 50 Am. Dec. 119; Little v. Bunce, 28 Am. Dec. 363; McCracken v. Paul, 67 Am. St. Rep. 948; Haebler v. Myers, 28 Am. St. Rep. 589, 15 L. R. A. 588; Peyser v. Mayor, 26 Am. Rep. 624.

HAWLEY v. HUNT, 27 IOWA 303

1. Insolvent Debtor—Discharge of in Insolvency Proceeding in Court of One State—Effect on Debt of Creditor who is Citizen of Another.—A discharge under a state insolvent law will not and cannot discharge a debt due to a citizen of another state, unless the latter appears and voluntarily submits to the jurisdiction of the court by becoming a party to the insolvency proceeding, or claiming a dividend thereunder, pp. 307, 314.

Cited in Williams v. Haines, 27 Iowa 254, 1 Am. Rep. 268, the court holding that under Chap. 76 of the Code of 1860, the want or

failure, in whole or in part, of the consideration of a written contract even under seal, may be shown as a defense in an action thereon; and this applies to a contract executed in a foreign state and sought to be enforced in a court hereof; that such statute relates to the remedy, and does not impair the obligation of contracts as inhibited by the Constitution of the United States.

WEBSTER v. CEDAR RAPIDS & ST. PAUL R. R. CO., 27 IOWA 315

1. Appeal—Errors which Can be Corrected Below—Necessity of Motion before Appeal—Excessive Judgment.—Under Sec. 3545 of the Code of 1860, an error which might have been corrected by motion in the lower court will not be considered or reviewed upon appeal to the Supreme Court, unless a motion for such correction was made and overruled in the court below before the prosecution of the appeal.

This rule applies to an excessive judgment, pp. 317, 318.

Reaffirmed and explained in De Tar v. Boone County, 34 Iowa 490, holding that where a judgment by default is entered on an original notice which is defective in warning the defendant to appear and answer at "the next term" of court, that before such judgment will be reversed therefor, a motion to set it aside on account thereof must first be made in the trial court.

Reaffirmed and explained as to first paragraph in Pratt v. Western Stage Co., 27 Iowa 364, 365, holding that a judgment rendered by default upon a service of notice, the return on which is defective is not void, and that such irregularity must be presented to the lower court by motion before appeal, or the error will not be reviewed by the Supreme Court.

Reaffirmed and explained as to first paragraph in Wile v. Wright, Adm'r, 32 Iowa 461, holding that where, in an action against a personal representative judgment is erroneously entered against him as individual, instead of as representative, he cannot complain thereof upon appeal, unless he called the trial court's attention thereto, and moved for its correction before prosecuting the appeal.

Unreported citation, 134 N. W. 738.

Special cross reference. For further cases citing and sustaining the text, and others, see annotations under Dickey v. Harmon (26 Iowa 501), ante. p. 354.

Cross references. See further on this question, annotations under Rule 1 of Coffin, Ex'r, v. City Council of Davenport (26 Iowa 515), ante. p. 358; Decatur County v. Clements (18 Iowa 536), Vol. II, p. 678; Pigman v. Denney (12 Iowa 396), Vol. II, p. 66.

MCDONALD v. MUSCATINE NATIONAL BANK, 27 IOWA 319

1. Promissory Note—Filling of Blank—Fraud—Innocent Holder.—Where a note is procured by fraud practiced on the maker

he is nevertheless liable thereon to a *bona fide* holder who took, for value and before maturity.

So where a party signs a blank paper intending that it be filled up as an order for a machine purchased, and intrusts it to another for such purpose, and the latter fills it up as a promissory note, the signer is liable as maker to an innocent holder for value, who took before maturity, p. 322.

Reaffirmed, explained and qualified as to second paragraph in Rainbolt v. Eddy, 34 Iowa 441, 442, 11 Am. Rep. 152, holding that where, after execution and delivery, the payee without the maker's knowledge or consent, inserts "ten per cent. inst." in a blank in such note, and makes the alteration in such a manner as to afford no suspicion thereof, or the means of detecting it, such note, as altered, is valid as against the maker in the hands of an innocent purchaser, for value and before maturity.

Reaffirmed and varied as to second paragraph in Plummer v. People's Nat'l Bank, 65 Iowa 406, 21 N. W. 699, holding that where the beneficiary named in a policy of life insurance signs an assignment in blank, and sends it to her husband, the insured, to be used for a specific purpose, and the husband fills in the blank and delivers it to a person as security for money borrowed by him, the assignment is valid in favor of the lender or assignee, who acted in good faith and without notice, although the husband had no authority to fill in the blank or transfer the policy for such purpose.

Distinguished and narrowed in Knoxville Nat'l Bank v. Clark, 51 Iowa 271, 33 Am. Rep. 129, 1 N. W. 491, holding that a forged negotiable instrument is unenforceable in whosoever hands it may come; and that where a negotiable note not in blank, is materially altered after its execution and without the consent of the maker, such fact is a defense to an action thereon by a *bona fide* holder who obtained it before maturity and for value: Hence holding that where a negotiable note for "\$10..... ten dollars" is so altered before indorsement to read "\$110. One hundred and ten dollars," such alteration is a defense in an action thereon by a *bona fide* holder who obtained it for value and before maturity.

Cross references. See further on this question, annotations under McCramer v. Thompson (21 Iowa 244), Vol. II, p. 898; Hall's Adm'x, v. McHenry (19 Iowa 521), Vol. II, p. 758; Trustees of Iowa College v. Hill (12 Iowa 462), Vol. II, p. 75.

TUFTS & COLLY v. LARNED, 27 IOWA 330

1. Equity—Written Contracts—Accident and Mistake—Sufficiency of Proof to Establish.—In order to vary, control or reform a written contract in an action in equity, on the ground of accident or mistake, the proof thereof must be plainly shown, and be beyond fair or reasonable controversy, p. 332.

Reaffirmed and explained in First Presbyterian Church of Logan v. Logan, 77 Iowa 328, 42 N. W. 311; Ch. Title & Trust Co., Rec'r, v. Smith, 94 Iowa 405, 62 N. W. 793; Murphy v. First Nat'l Bank of Cedar Falls, Rec'r, 95 Iowa 329, 63 N. W. 703, holding that before a written instrument will be reformed in equity on the ground of fraud, accident or mistake, the proof must make out the fact so as to strike all minds that it is unquestionable and free from reasonable doubt.

Reaffirmed and explained in Williams v. Everham, 90 Iowa 422, 57 N. W. 901, holding that parol evidence of contemporaneous agreements or stipulations varying or controlling a written contract is only admissible, both at law and in equity, where they were omitted therefrom by reason of fraud, accident or mistake; but that in order to establish such a fact, such evidence must be clear and satisfactory.

Reaffirmed and extended in Chapman v. Dunwell, 115 Iowa 534, 88 N. W. 1068, holding further that in order to justify a court of equity in reforming a written contract or other instrument on the ground of fraud, accident or mistake, the proof thereof must be "clear, unequivocal and satisfactory."

Reaffirmed and extended in Bowman v. Besley, 122 Iowa 45, 97 N. W. 62, holding further that to make out a case for reformation, no fraud being alleged or proven, it must be made to appear that there was a mutual mistake, and that the contract, as written, does not express the agreement as actually intended by the parties.

Cross reference. See further on this question, annotations under Gelpcke et al, v. Blake (15 Iowa 387), Vol. II, p. 355.

STATE v. FREEMAN, 27 IOWA 333

1. Change of Venue in Criminal Cases—Discretion of Trial Court—Reversal for Abuse.—The trial court is vested with a sound judicial discretion in deciding upon a motion for a change of venue in criminal cases, and he is to rule thereon according to the very Right of it: And his ruling thereon will not be ground for reversal, unless it is clearly shown that such discretion was abused, p. 335.

Reaffirmed in State v. Hale, 65 Iowa 577, 22 N. W. 683.

Cross reference. See further on this question, annotations under State v. Ingalls and King (17 Iowa 8), Vol. II, p. 480.

2. Criminal Law—Sufficiency of Allegations of Indictment—Intoxicating Liquors—Nuisance—Sufficiency of Indictment for.—Under Sec. 4659 of the Code of 1860, an indictment is sufficient if it is so worded as to enable a person of common understanding to know what offense is intended to be charged.

So an indictment for nuisance, under Sec. 1564 of the Code of 1860, charging that the accused "did use and keep a room and place for the purpose of selling therein, and did then and there sell in-

toxicating liquors in violation of Sec. 1562 of the Code of 1860," is sufficient, pp. 336, 337.

Reaffirmed and explained in State v. Allen, 32 Iowa 249, holding that an indictment for nuisance charging that accused "did establish, continue and use a building for the purpose and with the intent of owning, keeping and selling therein intoxicating liquor, contrary to law, and did sell, then and there, intoxicating liquors," is sufficient.

Reaffirmed and explained in State v. Mohn, 53 Iowa 261, 262, 5 N. W. 184, holding that an indictment under Sec. 1542 of the Code of 1873, charging defendant with having "kept intoxicating liquors for the purpose of the sale," instead of "with intent to sell," is sufficient.

Cited in State v. Waltz, 74 Iowa 611, 38 N. W. 495, the court holding that an indictment charging the offense of nuisance by keeping a place for the unlawful sale of intoxicating liquors, is good in the absence of averments particularly describing the place, house or building in which the nuisance is maintained: Although the court seems to decide that unless the place, building, etc., is particularly described in the indictment, it is not sufficient to authorize a judgment of abatement of the nuisance upon conviction of accused for the offense, but is, in such case, only sufficient to authorize the conviction of the accused.

Cited in State v. Pinckney, 111 Iowa 36, 82 N. W. 450, the court holding that an indictment for nuisance charging that accused "did keep, use and occupy a certain building in * * * Forest City, county and state aforesaid, commonly known as a drug store, with the intent to sell there intoxicating liquors, to-wit, * * * and then and there did sell the same," is sufficient.—The court reaffirming the first paragraph of the text, under Sec. 5280 of the Code of 1897, corresponding to section 4659 of the Code of 1860.

Cross references. See further in this connection, annotations under State v. Hass (22 Iowa 193), ante. p. 18; State v. Kreig (13 Iowa 462), Vol. II, p. 174; State v. Collins (11 Iowa 141), Vol. I, p. 789.

VAN METRE v. WOLF, 27 IOWA 341

(Former Appeals, 23 Iowa 397; 19 Iowa 134.)

1. Husband and Wife—Wife Surety for Husband—Effect of Wife Suffering Personal Judgment to be Entered against Her.—Where a married woman suffers default judgment to be entered against her in an action on a note on which she is surety for her husband, she cannot thereafter avoid such judgment on the ground of coverture. A judgment against a married woman in such case is conclusive as to the binding force of the contract, and of the right of the creditor to enforce it against her separate property. A judgment at law against a married woman upon a contract which she was legally

empowered to make, is enforceable as other personal judgments at law, pp. 345, 346.

Reaffirmed and explained in Guthrie v. Howard, 32 Iowa 55, 56, holding that the fact of coverture will constitute no defense to a judgment fairly obtained upon personal notice, against a married woman.

Cross reference. See further on this question, annotations and cross references under Wolf v. Van Metre (23 Iowa 397), ante. p. 114.

MORSEMAN v. YOUNKIN, 27 IOWA 350

1. Taxation and Revenue—National Banks—How Taxed.—The Act of 1868, Acts of 1868, p. 213, requiring shares in national banks to be taxed as personal property in the hands and name of their owner, to be assessed as other moneyed capital of individuals, is constitutional, pp. 352-354.

Special cross reference. For cases citing the text, and others on the question, see annotations under Hubbard v. Board of Supervisors of Johnson County (23 Iowa 130), ante. p. 88.

HEISER v. VAN DYKE, MARTIN & Co., 27 IOWA 359

1. Trial—Verdict—Sealed Verdict Left with Bailiff and Separation of Jury—Validity.—The fact that a jury, without leave of court or consent of parties, seal their verdict, place it in the hands of the sworn bailiff to be by him returned into court, and then separate, does not affect its validity, it being received into court and read in the presence of the jury, and they agreeing thereto as their verdict as required by law, at the time it is so received and read, pp. 359, 360.

Special cross reference. For cases citing and sustaining the text, and others on this question, see annotations under Hamilton v. Barton (20 Iowa 505), Vol. II, p. 854.

Cross reference. See further on this question, annotations under Morrison v. Overton (20 Iowa 465), Vol. II, p. 845.

TAYLOR v. SHORT'S ADM'R, 27 IOWA 361, 1 AM. REP. 280

1. Mortgage on Several Lots or Parcels of Land—Release by Mortgagee of Lien on Some—Rights of Purchasers of Others.—Where there is a mortgage on several parcels or lots of land, and the mortgagee, with full knowledge that the mortgagor has sold some of them to third persons, releases the mortgage on some of the parcels or lots retained and owned by the mortgagor, the release discharges the lien on those sold, to the *pro rata* value of the parcels or lots on which the lien is released, pp. 362, 363.

Cited in Witt v. Rice, 90 Iowa 456, 57 N. W. 952, the court holding that when mortgaged property is alienated, it must bear its share

of the mortgage debt *pro rata* according to value, and without regard to improvements placed thereon by purchasers subsequent to the time of the execution of the mortgage.

Cited in Malanaphy v. Fuller & Johnson Mfg. Co., 125 Iowa 723, 724, 106 Am. St. Rep. 332, 101 N. W. 642, the court holding that the discharge of the principal, either by act of the parties or by operation of law, from his liability to pay a debt or claim secured, releases the surety thereon, although judgment therefor may have been rendered against the latter before such release: And that in such a case a court of equity will enjoin the collection of the judgment against the surety.

Cross reference. See further in this connection, annotations under Rule 1 of Massie v. Wilson (16 Iowa 390), Vol. II, p. 447.

PRATT v. WESTERN STAGE CO., 27 IOWA 363

1. Actions—Original Notice—Defective Return on—Judgment Erroneous but not Void—Appeal—Necessity of Motion to Correct before Taking.—A judgment rendered upon a service of original notice, the return on which is *defective*, is not void, but merely erroneous or irregular, and must be corrected by motion in the court below, or by appeal.

Under Sec. 3545 of the Code of 1860, an error which might have been corrected by motion in the lower court will not be considered or reviewed upon appeal to the Supreme Court, unless a motion for such correction was made and overruled in the court below before the prosecution of the appeal: And this applies to the above case, pp. 364, 365.

Reaffirmed and explained in De Tar v. Boone County, 34 Iowa 490, holding that where a judgment by default is entered on an original notice which is defective in warning the defendant to appear and answer at "the next term" of court, that before such judgment will be reversed therefor, a motion to set it aside on account thereof, must first be made in the trial court.

Reaffirmed and explained as to first paragraph in Irions v. Keystone Mfg. Co., 61 Iowa 407, 16 N. W. 350, holding that a judgment entered by default upon a *defective* notice will not be set aside in equity, as void.

Reaffirmed and extended in Gray v. Wolf, 77 Iowa 632, 42 N. W. 504, holding further that—under Sec. 3168 of the Code of 1873, corresponding to the section of the text—the rule applies where the original notice is defective.

Unreported citation, 134 N. W. 739.

Cross references. See further on this question, annotations and cross references under Webster v. Cedar Rapids & St. P. R. R. Co. (27 Iowa 315), ante. p. 407. See, also, in this connection, annotations under Rule 1 of Shawhan v. Loffer (24 Iowa 217), ante. p. 170.

GAMMER & PRINDLE *v.* BORGAIN, 27 IOWA 369

I. Sales of Personal Property—Absolute and Conditional Warranty—Buyer Failing to Comply with Conditions.—The seller, in a sale of personal property, may make a warranty of the quality of the article sold, absolute or conditional; and if the warranty is conditional the buyer before he can sue for breach thereof, must comply with the conditions, p. 372.

Special cross reference. For cases citing, explaining and qualifying the text, and many others, see annotations and note under Bomberger, Wright & Co. *v.* Griener (18 Iowa 477), Vol. II, p. 669.

MORRISON *v.* WILKERSON, 27 IOWA 374

I. Ejectment—Proof of Title Required of Plaintiff in Action of—Estoppel of Defendant.—In an action of right or ejectment for the recovery of real property, the plaintiff need only prove and trace his title to a point where the defendant is estopped to deny it; as to a person under whom the defendant held as tenant and whose title he (defendant) acknowledged, p. 375.

Reaffirmed in Denecke *v.* Miller & Son, 142 Iowa 493, 19 Am. & Eng. Ann. Cas. 949, 119 N. W. 383.

Special cross reference. For further cases citing the text, and others in this connection, see annotations under Rule 1 of Cooley *v.* Brayton (16 Iowa 10), Vol. II, p. 394.

Cross reference. See further on this question, annotations under Rule 4 of Byers *v.* Rodabaugh (17 Iowa 53). Vol. II, p. 491.

ELI *v.* GRIDLEY, 27 IOWA 376

I. Real Estate—Possession as Notice—Rights of Purchasers.—One who purchases real estate from one not in possession thereof is chargeable with notice of and takes subject to the rights, title and equities of a third person who is in possession thereof at the time of the purchase, p. 377.

Reaffirmed in Phillips *v.* Blair, 38 Iowa 656; Benbow *v.* Boyer, 89 Iowa 498, 56 N. W. 545.

Cross reference. See further on this question, annotations and cross references under Dickey *v.* Lyon (19 Iowa 544), Vol. II, p. 763.

NEWCOMB *v.* DEWEY, 27 IOWA 381

I. Actions—No Notice—Want of Jurisdiction—Void Judgment—Effect of Record Recitals.—Where the defendant has *no* notice of an action, or the court otherwise has no jurisdiction, a judgment rendered is void *ab initio*, although the record may recite facts constituting notice, or shows that the court had jurisdiction, pp. 388-390.

Reaffirmed in Stone v. Skerry, 31 Iowa 583; Bridges v. Arnold, 37 Iowa 223; State Ins. Co. v. Granger, 62 Iowa 275, 276, 17 N. W. 505; Wolf v. Shenandoah Nat'l Bank, 84 Iowa 140, 50 N. W. 562; Jamison v. Weaver, 84 Iowa 613, 51 N. W. 66, holding the rule to apply upon direct attack of a judgment where the record recites that due notice was had.

Reaffirmed and explained in Sallady v. Bainhill, 29 Iowa 556, holding that in an action upon a judgment rendered in a justice's court in this state, the defendant may show want of notice to him in the first action, by extrinsic evidence contradicting the judgment which recites that due notice was had upon him.

Reaffirmed and explained in Melhop & Kingman v. Doane & Co. 31 Iowa 400, 7 Am. Rep. 147, holding that in personal actions, if the court has jurisdiction of the subject-matter and of the parties, by the service of notice of its pendency, its judgment is binding and conclusive, while it remains unreversed, however erroneous: But that it is indispensable to the binding effect of a judgment that the court had jurisdiction of the subject-matter and of the parties: And if the jurisdiction fails as to either, the judgment is a mere nullity—applying the rule to an action in this state upon a foreign judgment.

Reaffirmed and explained in De Tar v. Boone County, 34 Iowa 491, holding that *defective* notice is not sufficient to allow the enjoining or setting aside a judgment, but that in order to justify such proceedings, the original notice must amount to *no notice*.

Reaffirmed and explained in Lyon v. Vanatta, 35 Iowa 525-529, holding that when there is such a defective original notice as to be equivalent to *no notice*, the judgment and all proceedings are void, whether assailed directly or collaterally: And holding also that such a notice is one which warns the defendant to appear and answer at a time when the term of court is not in session and before it commences.

Reaffirmed and explained in Clark v. Little, 41 Iowa 500, 501, holding that where a judgment rendered on a defective return of service of original notice, is sought to be enforced in another action, and the record in the first action does not show that the court decided upon its sufficiency thereon, the defense that the defendant was never legally served with notice and that the court rendering the judgment had no jurisdiction, is available in the last action.

Reaffirmed and explained in Sweeley v. Van Steenburgh, 69 Iowa 699-701, 26 N. W. 79, 80, holding that under Sec. 2618 of the Code of 1873, a judgment upon a notice by publication as allowed by such section, is valid, when the records show that the notice was published in the manner and for the length of time prescribed by law, before the rendition of the judgment, if the defendant is *in fact* a non-resident, although proof of such non-residence be not shown by the record—But see Carnes v. Mitchell, 82 Iowa 606, 607, 48 N. W. 943

(not citing the text), distinguishing the above case, and holding that unless an affidavit be filed stating, as required by Sec. 2618 of the Code of 1873, that personal service cannot be made on the defendant within this state, that a decree rendered upon a service by publication, in an action involving a matter allowing service by publication, under such section, is *void* for want of jurisdiction of the court.

Reaffirmed, explained and qualified in Farmers' Ins. Co. v. Highsmith, 44 Iowa 333, holding that if it appears that there was a notice in an action, although it was defective, or that the service thereof was imperfect, and that either or both failed to comply strictly with the statute, and the court determined the sufficiency thereof, which is shown upon the record, the judgment rendered thereon will not be held void upon collateral attack: And that if such determination be erroneous, it should be corrected by appeal, and cannot be reserved as a ground of attack upon the judgment in a collateral proceeding.

Cited with approval in Tomlin v. Woods, 125 Iowa 378, 101 N. W. 135, being an action on a foreign judgment, the foreign action on which it was based being full of *irregularities* and *defective* proceedings, but none sufficient to make the judgment void.

Cited in Green v. Talbot, 36 Iowa 503 (dissenting opinion), the majority court holding that where the mayor of a city has authority under an ordinance to inflict a fine for a violation thereof, but not to imprison accused therefor, but who, acting in good faith, without malice and through an error in the construction of the ordinance, inflicts a fine and orders accused to be imprisoned therefor, he is not liable in damages in an action for false imprisonment.

Cross references. See further on this question, annotations under Shawhan v. Loffer (24 Iowa 217), ante. p. 170; Kitsmiller v. Kitchen (24 Iowa 163), ante. p. 158; Harshey v. Blackmarr (20 Iowa 161), Vol. II, p. 797; Burchett v. Casady (18 Iowa 342), Vol. II, p. 641; Bonsall v. Isett (14 Iowa 309), Vol. II, p. 242.

2. Judgment—Action in Equity to Set Aside—Venue.—The district court rendering a judgment or decree has jurisdiction of an action in equity to set it aside for want of jurisdiction, p. 387.

Special cross reference. For cases citing, sustaining and explaining the text, and others, see annotations under Givens v. Campbell (20 Iowa 79), Vol. II, p. 778.

3. Mortgages on Land—Foreclosure of Senior Mortgage by Action—Junior Mortgagee not a Party—Redemption.—The right of a junior mortgagee of land to redeem from a senior mortgage thereon is not cut off or affected by a decree and sale in an action to foreclose the senior to which he (the junior) was not made a party, pp. 390, 391.

Reaffirmed in Gower v. Winchester, 33 Iowa 305.

Reaffirmed in Stone v. Skerry, 31 Iowa 583; Bridges v. Arnold, 37 Iowa 223; State Ins. Co. v. Granger, 62 Iowa 275, 276, 17 N. W. 505; Wolf v. Shenandoah Nat'l Bank, 84 Iowa 140, 50 N. W. 562; Jamison v. Weaver, 84 Iowa 613, 51 N. W. 66, holding the rule to apply upon direct attack of a judgment where the record recites that due notice was had.

Reaffirmed and explained in Sallady v. Bainhill, 29 Iowa 556, holding that in an action upon a judgment rendered in a justice's court in this state, the defendant may show want of notice to him in the first action, by extrinsic evidence contradicting the judgment which recites that due notice was had upon him.

Reaffirmed and explained in Melhop & Kingman v. Doane & Co. 31 Iowa 400, 7 Am. Rep. 147, holding that in personal actions, if the court has jurisdiction of the subject-matter and of the parties, by the service of notice of its pendency, its judgment is binding and conclusive, while it remains unreversed, however erroneous: But that it is indispensable to the binding effect of a judgment that the court had jurisdiction of the subject-matter and of the parties: And if the jurisdiction fails as to either, the judgment is a mere nullity—applying the rule to an action in this state upon a foreign judgment.

Reaffirmed and explained in De Tar v. Boone County, 34 Iowa 491, holding that *defective* notice is not sufficient to allow the enjoining or setting aside a judgment, but that in order to justify such proceedings, the original notice must amount to *no notice*.

Reaffirmed and explained in Lyon v. Vanatta, 35 Iowa 525-529, holding that when there is such a defective original notice as to be equivalent to *no notice*, the judgment and all proceedings are void, whether assailed directly or collaterally: And holding also that such a notice is one which warns the defendant to appear and answer at a time when the term of court is not in session and before it commences.

Reaffirmed and explained in Clark v. Little, 41 Iowa 500, 501, holding that where a judgment rendered on a defective return of service of original notice, is sought to be enforced in another action, and the record in the first action does not show that the court decided upon its sufficiency thereon, the defense that the defendant was never legally served with notice and that the court rendering the judgment had no jurisdiction, is available in the last action.

Reaffirmed and explained in Sweeley v. Van Steenburgh, 69 Iowa 699-701, 26 N. W. 79, 80, holding that under Sec. 2618 of the Code of 1873, a judgment upon a notice by publication as allowed by such section, is valid, when the records show that the notice was published in the manner and for the length of time prescribed by law, before the rendition of the judgment, if the defendant is *in fact* a non-resident, although proof of such non-residence be not shown by the record—But see Carnes v. Mitchell, 82 Iowa 606, 607, 48 N. W. 943

(not citing the text), distinguishing the above case, and holding that unless an affidavit be filed stating, as required by Sec. 2618 of the Code of 1873, that personal service cannot be made on the defendant within this state, that a decree rendered upon a service by publication, in an action involving a matter allowing service by publication, under such section, is *void* for want of jurisdiction of the court.

Reaffirmed, explained and qualified in Farmers' Ins. Co. v. Highsmith, 44 Iowa 333, holding that if it appears that there was a notice in an action, although it was defective, or that the service thereof was imperfect, and that either or both failed to comply strictly with the statute, and the court determined the sufficiency thereof, which is shown upon the record, the judgment rendered thereon will not be held void upon collateral attack: And that if such determination be erroneous, it should be corrected by appeal, and cannot be reserved as a ground of attack upon the judgment in a collateral proceeding.

Cited with approval in Tomlin v. Woods, 125 Iowa 378, 101 N. W. 135, being an action on a foreign judgment, the foreign action on which it was based being full of *irregularities* and *defective* proceedings, but none sufficient to make the judgment void.

Cited in Green v. Talbot, 36 Iowa 503 (dissenting opinion), the majority court holding that where the mayor of a city has authority under an ordinance to inflict a fine for a violation thereof, but not to imprison accused therefor, but who, acting in good faith, without malice and through an error in the construction of the ordinance, inflicts a fine and orders accused to be imprisoned therefor, he is not liable in damages in an action for false imprisonment.

Cross references. See further on this question, annotations under Shawhan v. Loffer (24 Iowa 217), ante. p. 170; Kitsmiller v. Kitchen (24 Iowa 163), ante. p. 158; Harshey v. Blackmarr (20 Iowa 161), Vol. II, p. 797; Burchett v. Casady (18 Iowa 342), Vol. II, p. 641; Bonsall v. Isett (14 Iowa 309), Vol. II, p. 242.

2. Judgment—Action in Equity to Set Aside—Venue.—The district court rendering a judgment or decree has jurisdiction of an action in equity to set it aside for want of jurisdiction, p. 387.

Special cross reference. For cases citing, sustaining and explaining the text, and others, see annotations under Givens v. Campbell (20 Iowa 79), Vol. II, p. 778.

3. Mortgages on Land—Foreclosure of Senior Mortgage by Action—Junior Mortgagee not a Party—Redemption.—The right of a junior mortgagee of land to redeem from a senior mortgage thereon is not cut off or affected by a decree and sale in an action to foreclose the senior to which he (the junior) was not made a party, pp. 390, 391.

Reaffirmed in Gower v. Winchester, 33 Iowa 305.

Reaffirmed in Stone v. Skerry, 31 Iowa 583; Bridges v. Arnold, 37 Iowa 223; State Ins. Co. v. Granger, 62 Iowa 275, 276, 17 N. W. 505; Wolf v. Shenandoah Nat'l Bank, 84 Iowa 140, 50 N. W. 562; Jamison v. Weaver, 84 Iowa 613, 51 N. W. 66, holding the rule to apply upon direct attack of a judgment where the record recites that due notice was had.

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(not citing the text), distinguishing the above case, and holding that unless an affidavit be filed stating, as required by Sec. 2618 of the Code of 1873, that personal service cannot be made on the defendant within this state, that a decree rendered upon a service by publication, in an action involving a matter allowing service by publication, under such section, is *void* for want of jurisdiction of the court.

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Cross references. See further on this question, annotations under Shawhan v. Loffer (24 Iowa 217), ante. p. 170; Kitsmiller v. Kitchen (24 Iowa 163), ante. p. 158; Harshey v. Blackmarr (20 Iowa 161), Vol. II, p. 797; Burchett v. Casady (18 Iowa 342), Vol. II, p. 641; Bonsall v. Isett (14 Iowa 309), Vol. II, p. 242.

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3. Mortgages on Land—Foreclosure of Senior Mortgage by Action—Junior Mortgagee not a Party—Redemption.—The right of a junior mortgagee of land to redeem from a senior mortgage thereon is not cut off or affected by a decree and sale in an action to foreclose the senior to which he (the junior) was not made a party, pp. 390, 391.

Reaffirmed in Gower v. Winchester, 33 Iowa 305.

Distinguished and qualified in Mayer v. Farmers' Bank, 44 Iowa 215, holding that junior lienholders have the right of redemption where there has been a foreclosure of a mortgage on real estate, to which proceeding they have not been parties, and that where a sale is under Sec. 3664 of the Code of 1873, the purchaser thereunder takes subject to the right of redemption of junior lienholders, which right must be exercised in the time and manner allowed by law.

Cross references. See further on this question, annotations under Anson v. Anson (20 Iowa 55), Vol. II, p. 774; Newman v. De Lorimer (19 Iowa 244), Vol. II, p. 722; Johnson v. Harmon (19 Iowa 56), Vol. II, p. 691; Heimstreet v. Winnie (10 Iowa 430), Vol. I, p. 723.

MYERS v. McDONALD, SHERIFF, 27 IOWA 391

1. Husband and Wife—Wife's Personal Property in Possession of Husband—When Liable to Satisfy His Debts.—Where a wife permits her personal property to be in the possession of her husband, and fails to file notice of her ownership as provided by Sec. 2502 of the Code of 1860, it is subject to the satisfaction of the debt of her husband, where the credit was given without actual notice on the part of the creditor of the wife's ownership, pp. 397, 398.

Reaffirmed in Williams v. Brown, 28 Iowa 249, 250.

Special cross reference. For further cases citing, sustaining and qualifying the text, and others, see annotations under Smith v. Hewitt (13 Iowa 94), Vol. II, p. 123.

Cross reference. See further on this question, annotations under Jones v. Jones (19 Iowa 236), Vol. II, p. 720.

STATE v. McCORMICK, 27 IOWA 402

1. Murder—First Degree—Indictment for—Averments that it Was Wilful, etc.—When Required—Murder in Second Degree.—Under Sec. 4192 of the Code of 1860, an indictment for murder in the first degree where the deceased was not killed by means of poison, or by accused lying in wait, or in the perpetration or attempt to perpetrate arson, rape, robbery, mayhem, or burglary, must charge that the killing was done with malice aforethought and willfully, deliberately and premeditately; that is the indictment must allege an intent to kill by accused, and that the killing was so done, and with malice aforethought, willfully, deliberately and premeditately; but if such indictment fails to so aver when these averments are so required, it is good as an indictment for murder in the second degree, pp. 407-409, 412.

Reaffirmed in State v. Watkins, 27 Iowa 418, 419; State v. Shelton, 64 Iowa 337, 20 N. W. 462; State v. McPherson, 114 Iowa 495, 496, 87 N. W. 422; State v. Linhoff, 121 Iowa 633-635, 97 N. W. 78.

Reaffirmed in State v. Stanley, 33 Iowa 529, 530, holding that an indictment for murder in the first degree which is otherwise sufficient under the rule of the text, need not charge that the accused killed and *murdered* deceased, if words equivalent thereto are employed, and the crime is charged in ordinary language so as to enable a person of common understanding to know what is intended.

Reaffirmed and explained in State v. Boyle, 28 Iowa 523, 525, 526, holding that an indictment for murder, not committed by any of the means set out in the text, or in the perpetration or attempt to perpetrate any of the crimes therein set out, which avers that the killing was "willful, felonious, premeditated and with malice aforethought," but not averring that it was done "deliberately," fails to charge murder in the first degree, the accused can only be tried for murder in the second degree, and a conviction for the former thereunder will be reversed.

Reaffirmed and explained in State v. Knouse, 29 Iowa 119, 120, holding that when an indictment for murder fails to aver that the killing was willful, deliberate and premeditated, as required by the text, the accused can only be tried for murder in the second degree; and that it is reversible error to put the accused upon trial thereunder for murder in the first degree, although he may, upon such trial, be convicted of only murder in the second degree.

Reaffirmed and explained in State v. Dunn, 116 Iowa 222, 89 N. W. 986, holding that an indictment for murder in the first degree was sufficient which charged that accused "did, with specific intent to kill and murder the said J. W. willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, shoot off and discharge the contents of said deadly weapon * * * at, against, into and through the body of the said J. W."

Reaffirmed and narrowed in State v. Weese, 53 Iowa 94-96, 4 N. W. 829, holding that where—under Sec. 3849 of the Code of 1873, corresponding to the section of the text—an indictment charges that a murder was committed in the perpetration of robbery and burglary, it charges murder in the first degree, a conviction thereunder cannot be had for the second degree, and a verdict of guilty "as charged in the indictment" is a conviction of murder in the first degree.

Reaffirmed and narrowed in State v. Robinson, 126 Iowa 70, 71, 101 N. W. 635, holding that an indictment for murder in the first degree under Sec. 4728 of the Code of 1897, averring that the killing was done by means of the willful, unlawful and felonious administering of poison, is sufficient without an allegation of a specific intent to kill: And that a homicide thus committed cannot constitute murder in the second degree, or manslaughter.

Cited with approval in State v. Clemons, 51 Iowa 274, 1 N. W. 546, the case turning on other questions.

Cited in State v. Keasling, 74 Iowa 530, 531, 38 N. W. 398, the court holding that one indicted for assault with intent to commit murder, may thereunder be convicted of assault with intent to commit manslaughter.

And see 150 Iowa 704, not yet published.

Unreported citation, 130 N. W. 733; 136 N. W. 198.

(Note.—See further, State v. Gray 116 Iowa 231, 89 N. W. 987; State v. Wood, 112 Iowa 411, 84 N. W. 520; State v. Van Tassel, 103 Iowa 9, 72 N. W. 497; State v. Dooley, 89 Iowa 589, 57 N. W. 414; State v. Andrews, 84 Iowa 88, 50 N. W. 549; State v. Baldwin, 79 Iowa 718, 45 N. W. 297; State v. Perrigo, 70 Iowa 657, 28 N. W. 452; State v. Hockett, 70 Iowa 442, 30 N. W. 742; State v. Townsend, 66 Iowa 741, 24 N. W. 535; State v. Wells, 61 Iowa 629, 47 Am. Rep. 822, 17 N. W. 90; State v. Johnson, 8 Iowa 525, some important cases on this question, not citing the text.—Ed.)

Cross references. See Rule 2 hereof. See further on this question, annotations under Rule 1 of State v. Neely (20 Iowa 108), Vol. II, p. 786; State v. Tweedy (11 Iowa 350), Vol. I, p. 824; State v. Johnson (8 Iowa 525), Vol. I, p. 534; Fouts v. State (4 G. Greene 500), Vol. I, p. 153.

2. Murder—Indictment for Murder in First Degree—Sufficiency of Allegations.—To constitute a good indictment for murder in the first degree the facts showing the commission of the offense and the degree must be alleged. The naming the homicide as murder in the first degree in the introductory and concluding portions of the indictment, is not sufficient, unless the facts charged show that the crime is such a murder, pp. 412, 413.

Reaffirmed and explained in State v. Parsons, 54 Iowa 408, 6 N. W. 581; State v. Andrews, 84 Iowa 91, 50 N. W. 550, holding that the closing paragraph of an indictment, is only a legal conclusion from the facts therein previously stated, and is no part of the offense or crime charged.

Reaffirmed, explained and extended in State v. Shaw, 35 Iowa 577; State v. Butcher, 79 Iowa 112, 44 N. W. 239, holding that charging a person with the commission of a crime *by name* will not constitute a good indictment for the *crime named*, unless the facts charged show the offense to be such as the indictment names it.

3. Criminal Law — Murder — Appeal — Commuting Sentence upon.—Upon an appeal to the Supreme Court from a judgment of conviction of murder in the first degree, when the indictment only charges murder in the second degree and the facts only authorized a conviction for the latter degree, the Supreme Court may—under Sec. 4925 of the Code of 1860—upon motion of counsel for appellant (the accused) which is not objected to by the Attorney General, commute

the sentence to the highest penalty for murder in the second degree, and affirm the judgment as modified and commuted, p. 414.

Reaffirmed in State v. Thompson, 31 Iowa 354, a case on "all fours," where the sentence was commuted upon motion of the Attorney General, the accused not objecting thereto.

Reaffirmed in State v. Fields, 70 Iowa 197, 198, 30 N. W. 481, a case wherein a conviction for murder in the first degree was—under the Code of 1873—reduced by the Supreme Court to the maximum punishment for manslaughter, the evidence not showing that the killing was done willfully, deliberately and premeditatedly.

Cited in State v. Barr, 123 Iowa 142, 98 N. W. 597, the court holding that the Supreme Court may and should, in a criminal case, reverse on the ground that defendant has not had a fair trial, even though no specific rulings have been properly objected to.

4. Murder in First Degree—Proof of—Mere Proof of Killing Insufficient.—Upon the trial of an indictment for murder in the first degree, mere proof of killing without more, does not raise the presumption that it was done willfully, deliberately and premeditatedly; or it does not raise the presumption that the defendant is guilty of murder in the first degree, p. 413.

Reaffirmed and explained in State v. Phillips, 118 Iowa 677-679, 92 N. W. 882, holding that proof of an intent to kill on the part of accused upon the trial of an indictment for murder in the first degree does not necessarily imply deliberation and premeditation: That the intent to kill is not necessarily inconsistent with the crime of manslaughter or murder in the second degree: The court saying that "this is not to deny the rule that where homicide has been intentionally committed, and there is shown to have been no combat, sudden quarrel, or other provocation inducing or explaining the criminal act, the jury may therefrom find deliberation and premeditation. In such case, however, the finding of deliberation and premeditation is not reached from the intentional killing alone, but from such killing, together with the affirmative showing of an absence of all circumstances tending to indicate the lower degree of offense. * * * * Whatever may be the rule in the absence of any combat, it cannot be said that where parties armed with loaded guns are arrayed against each other, firing rapidly back and forth, with evident deadly intent, any presumption of premeditation and deliberation arises from the mere fact that one of the persons so contending is seen to shoot and kill an antagonist. Applying the rule that malice, which is the criterion of murder, may be inferred from the mere fact of intentional killing, proof of a homicide under such circumstances, in the absence of any question of self defense will justify a conviction of murder in the second degree. The inference, so far as inference in such cases may be allowed, is of murder in the second degree, leaving it to the State to establish, if it can, the elements of deliberation and premeditation necessary to raise the crime

to the first degree, and to the defendant to reduce it to manslaughter if he can by rebutting the presumption of malice."

STATE v. WATKINS, 27 IOWA 415

1. Murder—First Degree—Indictment for—Averments that it Was Willful, etc.—When Required—Murder in Second Degree.—Under Sec. 4192 of the Code of 1860, an indictment for murder in the first degree where the deceased was not killed by means of poison, or by accused lying in wait, or in the perpetration or attempt to perpetrate, arson, rape, robbery, mayhem or burglary, must charge that the killing was done with malice aforethought and willfully, deliberately and premeditatedly; that is the indictment must allege an intent to kill by accused, and that the killing was so done and with malice aforethought, willfully, deliberately and premeditatedly; but if such indictment fails to so aver when these averments are so required, it is nevertheless good as an indictment for murder in the second degree, pp. 418, 419.

Cited in State v. Thompson, 31 Iowa 394; State v. Andrews, 84 Iowa 91, 50 N. W. 550, turning on other points.

Special cross reference. For further cases citing, sustaining, explaining, etc., the text, and many others, see annotations under Rule 1 of State v. McCormick (27 Iowa 402), ante. p. 416, next preceding.

STATE v. STRATTON, 27 IOWA 420, 1 AM. REP. 282

1. Forgery—What Constitutes—Material Alteration of Note.—Forgery may be committed by fraudulently and materially altering a note so as to give it a new legal effect or operation, materially affecting the liability of the promisor, or the value of the instrument.

So it is forgery for one to fraudulently detach a condition from the bottom of a promissory note and which was made contemporaneously with the note and is, therefore, part of it, whereby such note is changed from a non-negotiable to a negotiable instrument, pp. 423-425.

Reaffirmed and varied in Heaton v. Ainley, 108 Iowa 113, 78 N. W. 798, holding that an indorsement on the back of a note secured by mortgage, made contemporaneously with the execution of the note and mortgage, is to be construed as part of the transaction, and the mortgage, note and indorsement are to be construed together, and effect be given to every expression in the three, if it can be done fairly: And that in such case the court will consider all the facts and circumstances surrounding the transaction, in order to arrive at and give effect to the object and intention of the parties.

Cited in Sawyer's Adm'x, v. Campbell, 107 Iowa 400, 401, 78 N. W. 56, 57, the court holding that an immaterial alteration of a

written contract or other instrument, that is one that does not give it a different legal effect, does not affect the validity of the contract or instrument: And that if such an alteration is immaterial as above, the fact that it was made *with intent* to change the legal effect of the contract or instrument, will not be considered.

Cross references. See further on this question, annotations under Rule 2 of State v. Thompson (19 Iowa 299), Vol. II, p. 729. See in this connection, annotations under Robinson v. Phoenix Ins. Co. (25 Iowa 430), ante. p. 282; Hall's Adm'x, v. McHenry (19 Iowa 521), Vol. II, p. 758; Elmore v. Higgins (20 Iowa 250), Vol. II, p. 811.

STATE v. HARRIS, 27 IOWA 429

1. Intoxicating Liquors—Nuisance—Proof Required.—Upon the trial of an indictment for nuisance under Sec. 1564 of the Code of 1860, the State must prove either that the defendant kept intoxicating liquors in a place or building with an intent to unlawfully sell, or an unlawful sale thereof therein, or that they were unlawfully manufactured therein, p. 431.

Cited in State v. Pinckney, 111 Iowa 36, 82 N. W. 450, the court holding that an indictment for nuisance charging that accused "did keep, use and occupy a certain building in * * * Forest City, county and state aforesaid, commonly known as a drug store, with the intent to sell there intoxicating liquors, to-wit, * * * and then and there did sell the same," is sufficient.

Special cross reference. For further cases citing, sustaining and explaining the text, and others, see annotations under State v. Hass (22 Iowa 193), ante. p. 18; and see, also, cross references there found.

SWEATLAND v. ILLINOIS & MISSISSIPPI TELEGRAPH CO., 27 IOWA 433,

1 AM. REP. 285

1. Telegraph Companies—Mistake in Telegram—Liability of Company in Damages for, when—Condition on Message Requiring Repeating, Validity.—In the absence of a statute to the contrary a telegraph company may, by printed conditions which are made part of the message, exempt itself from liability for mistakes in an un-repeated message occasioned by unavoidable or uncontrollable causes, provided proper instruments have been used, and proper care and skill exercised by the company's employees to avoid or prevent the mistake. But the company is, notwithstanding the special printed conditions, responsible for mistakes happening in consequence of its own fault—such as want of proper skill, or ordinary care on the part of its operators, or the use of defective instruments, pp. 450, 451.

Reaffirmed in Manville v. Western Union Tel. Co., 37 Iowa 218, 18 Am. Rep. 8; Aiken v. Western Union Tel. Co., 69 Iowa 35, 36, 58 Am. Rep. 210, 28 N. W. 421.

Reaffirmed and explained in Garrett v. Western Union Tel. Co., 83 Iowa 261, 262, 49 N. W. 89, holding that a telegraph company cannot, by printed conditions in or on a message blank, limit its liability for the negligence of its operators or employes in failing to correctly transmit, or failing to attempt to send, or failing to deliver a telegram.

Reaffirmed and extended in Harkness v. Western Union Tel. Co., 73 Iowa 193, 194, 5 Am. St. Rep. 672, 34 N. W. 813, holding further that a telegraph company cannot contract against, or restrict its liability for, its own negligence in failing to transmit and deliver a telegram: And holding further that one for whose benefit a telegram is sent may sue for damages for the negligent failure of the company to transmit and deliver it, subject to the right of the company to set-off any sum it paid the sender by way of liquidation of damages before it had knowledge that it was sent for the benefit of the plaintiff.

Cited in Rose v. Des Moines Valley R. R. Co., 39 Iowa 249, the court holding that a common carrier (in this case a railroad company) cannot, by notice or special contract restrict, limit or avoid its Common Law liability for negligence.

2. Telegraph Companies—Liability for Mistake in Message—Condition Requiring Message Repeated—Action for Damages for Mistake in Unrepeated Message—Negligence—Burden of Proof.—In an action for damages occasioned by reason of a mistake in an unrepeated telegram, where the message blank contained a printed condition that the company was not liable for mistakes in a message not repeated, the burden is on the plaintiff to prove that the mistake was caused by the want of ordinary and reasonable care or skill of the defendant's agent or agents, the use of defective instruments, or other negligence of the defendant, company, or its agents, p. 458.

Reaffirmed in Aiken v. Western Un. Tel. Co., 69 Iowa 35, 36, 58 Am. Rep. 210, 28 N. W. 421

Distinguished in Turner v. Hawkeye Telegraph Co., 41 Iowa 462, 20 Am. Rep. 605, holding that when a telegraph message of the condition of a market is sent on a blank containing no restriction of liability if it is not repeated, the presumption is that it was correct when received for transmission by the company; and in an action for damages for an error in such message, the burden is on the defendant (company), to show that the error occurred from causes or conditions which relieves it from liability; and that unless such proof is made it will be presumed that the error was caused by the company's negligence.—The case, however, turning upon other points.

3. Evidence—Res Gestæ—Declarations and Admissions of Agent as—Declarations and admissions of an agent in order to bind and

be receivable in evidence against the principal, as part of the *res gestæ*, must be made during the continuance of the agency and in regard to a transaction then depending or uncompleted: If made by the agent after the termination of the agency, or after the completion of the transaction, they are inadmissible against the principal, pp. 458, 459.

Reaffirmed in Osgood v. Bringolf, 32 Iowa 268; Worden, Adm'r v. Humeston, and Shenandoah Ry. Co., 72 Iowa 203, 33 N. W. 631; Yordy v. Marshall County, 86 Iowa 343, 53 N. W. 298; Phelps v. James, 86 Iowa 402, 41 Am. St. Rep. 497, 53 N. W. 274.

Reaffirmed and extended in Hudson v. C. & N. W. R. R. Co., 59 Iowa 585, 44 Am. Rep. 692, 13 N. W. 736, holding further that in an action for damages for injury to a horse occasioned by a defective crossing of a railroad company, evidence that it had been changed and repaired after the accident, is inadmissible.

And see 146 Iowa 740, 122 N. W. 144; 147 Iowa 105, 125 N. W. 811.

(Note.—There are numerous cases sustaining and explaining, but not citing, the text.—Ed.)

HAKES v. SHUPE, 27 IOWA 465

1. Actions—Original Notice—Personal Service—What Return to Show—Strict Compliance with Statute—When Jurisdiction of Court Rendering Judgment not Presumed upon Appeal.—Under Sec. 2817 of the Code of 1860, where an original notice is personally served upon the defendant, the returns must show the manner and place of making the service, that a copy thereof was delivered or offered to be delivered to the defendant, and the time of the making of the service.

Where jurisdiction depends upon the process, a strict compliance with the statute is required.

Upon appeal the jurisdiction of the court rendering the judgment appealed from, when denied, must be shown affirmatively, and it cannot be presumed; but when collaterally attacked, the jurisdiction will be presumed, pp. 466, 467.

Reaffirmed and explained in Wilson & Co. v. Call, 49 Iowa 465, 466, holding that a judgment rendered upon service of original notice, the return on which does not show the date of service, is, although erroneous and reversible upon appeal, not void, or subject to be assailed collaterally: But that such a return is *defective* merely.

Cited in Newman v. Bowers, 72 Iowa 467, 34 N. W. 213, an action *in rem* wherein the petition was in the name of "Levi Rike" and notice of publication and other proceedings were in the name of "Levi Pike," the court holding the decree therein to be void.

Cited in Dohms v. Mann, 76 Iowa 727, 39 N. W. 825, an action to foreclose a mortgage on an infant's land, wherein the return of the officer showed neither actual or constructive service of notice on him, or a substitute therefor, and no defense was made for him by his guardian, the court holding the judgment to be void, under such circumstances, both upon direct and collateral attack.

Cross reference. See further on this question, annotations under Rule 1 of Ballinger v. Tarbell (16 Iowa 491), Vol. II, p. 462.

2. Actions—Service of Notice Outside of State—Judgment in Personam on, Void.—A judgment *in personam* rendered against a defendant who is served with notice outside of the state, is void *ab initio*, p. 468.

Reaffirmed and explained in Smith v. Griffin, 59 Iowa 410, 411, 13 N. W. 423, holding that in a proceeding by attachment, when the defendant has not been personally served with process, the judgment should be *in rem* only, and not *in personam*; and that a judgment *in personam* in such case, is void *ab initio*.

Reaffirmed and explained in Kelly v. Norwich Fire Ins. Co., 82 Iowa 140, 47 N. W. 987, holding that a court can acquire no jurisdiction *in personam* by process served beyond the territorial limits of its jurisdiction upon a defendant who is not a resident therein, and that a judgment rendered thereon, is void *ab initio*.

And see 150 Iowa 524, 129 N. W. 499.

Cross references. See further on this question, annotations under Rule 2 of Johnson v. Dodge (19 Iowa 106), Vol. II, p. 699; Rule 1 of Darrance v. Preston (18 Iowa 396), Vol. II, p. 654; Weil v. Lowenthal (10 Iowa 575), Vol. I, p. 751.

BURMEISTER v. DEWEY, 27 IOWA 468

1. Judicial and Execution Sales of Several Parcels of Land in Gross—When not Cause for Setting Aside—Homestead.—Where several forty-acre tracts of land levied on under a special execution are offered for sale by the sheriff separately, and, upon no bids being received for any tracts, it is then sold in gross for a lump sum, the sale in gross is not a ground for setting aside the sale and deed made thereunder, in an action in equity for such purpose.

And the fact that the homestead of the execution debtor was included in such sale in gross in such an instance, does not change the rule or affect the validity of the sale, pp. 470-474.

Reaffirmed as to first paragraph in Hill v. Baker, 32 Iowa 307, 7 Am. Rep. 193; Brumbaugh v. Shoemaker, 51 Iowa 151.

Reaffirmed and explained in Conn. Mut. Life Ins. Co. v. Brown, 81 Iowa 44, 46 N. W. 749, holding that upon an execution sale of a divisible tract, or several tracts of land, if the entire tract or the different tracts, for any reason, are more valuable when taken together,

and will in that way sell for a larger sum, they may be so sold, and the sale will be subject to no objection by the land owner: And that the fact that no bids were made when the land was offered in separate tracts, and it was therefore, sold *en masse*, raises a presumption that the land is more valuable when taken together, or, at least, that defendant in execution suffered no prejudice by the sale.

Reaffirmed and extended in Egers, v. Redwood, 50 Iowa 290, 291, holding further that the presumption is that the sheriff did his duty in selling homestead and other land in a lump and for a gross sum under execution; and that in an action by the execution debtor to set such sale aside, he must aver and prove that before so selling, the sheriff did not offer the land other than the homestead for sale first, and then, upon receiving no bid or not enough to satisfy the execution, so sold the property in a lump.

Reaffirmed and extended in Ackerman v. Hendricks, 117 Iowa 108, 109, 90 N. W. 523, holding further that where the owner of several forty-acre tracts of land levied upon under execution, gives the sheriff notice of the selecting and designating the tract claimed as homestead, this notice dispenses with the sheriff platting and recording the plat of the homestead, as required by Sec. 2979 of the Code of 1897, corresponding to Sec. 1998 of the Code of 1873.

Cited in Newman, trustee, v. Franklin, 69 Iowa 246, 247, 28 N. W. 580, the court holding that the failure of the owner of several parcels of land levied upon under an execution, and of the sheriff to select and designate the homestead as provided by Secs. 1998, 1999 of the Code of 1873, does not render the execution sale *void*, but only *voidable*.

(Note.—See further, *Smith v. De Koch*, 81 Iowa 535, 46 N. W. 1056; *Lamb v. McConkey*, 76 Iowa 47, 40 N. W. 77; *Goodrich v. Brown*, 63 Iowa 247, 18 N. W. 893; *Owens v. Hart*, 62 Iowa 620, 17 N. W. 898; *Taylor v. Trulock*, 59 Iowa 558, 13 N. W. 661; *White v. Rowley*, 46 Iowa 680, some important cases connected with this subject, not citing the text.—Ed.)

Cross references. See further on this question, annotations under *Cunningham v. Felter* (26 Iowa 117), ante. p. 309; *Rule 2 of Love v. Cherry* (24 Iowa 204), ante. p. 166.

VAN ORMAN *v.* MERRILL, 27 IOWA 476

1. **Pleading and Practice—Equitable Defenses in Law Action—Failure to Separate and Try Law and Equitable Issues Separately—Appeal—Trial.**—Where equitable defenses are interposed in an action at law, and no steps are taken to separate the issues and have a separate trial of the law issue from the equitable issues, but the cause is thereafter treated by the parties and tried as a chancery cause upon all the issues, upon appeal to the Supreme Court a trial

de novo will be had upon *all the issues as one chancery cause*, pp. 478-483.

Reaffirmed in Gipps Bros. v. Coonrod, 54 Iowa 737, 7 N. W. 146; Thatcher v. Stickney Bros., 88 Iowa 457, 55 N. W. 489.

Reaffirmed and explained in Blough v. Van Hoorebeke, 48 Iowa 42; Balch v. Ashton & Co., 54 Iowa 125, 6 N. W. 147; Taylor & Co. v. Kier, 54 Iowa 646, 7 N. W. 120; O'Brien v. Putney, 55 Iowa 295, 7 N. W. 616; Fritzler v. Robinson, 70 Iowa 502, 31 N. W. 62; McVey v. Manatt, 80 Iowa 136, 45 N. W. 550, holding that a case which is tried as a chancery cause in the court below, will be tried as such upon appeal to the Supreme Court.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

Cross reference. See Rule 2 hereof.

2. Pleading and Practice—Action on Wrong Docket—Waiver of Objection.—Where an answer in an action at law joins both legal and equitable defenses, and the plaintiff without objection or motion to separate the issues and for a trial of the legal and equitable separately, consents to the cause being referred and both parties treat the cause before the referee upon *all the issues* as a chancery cause, the plaintiff cannot raise the question of the form of the answer, or the mixing of issues therein, after the filing of the report of the referee, pp. 479-481.

Reaffirmed and explained in Whiting, McKenna & Co. v. Root, 52 Iowa 302, 3 N. W. 134, holding that when equity takes cognizance of a case which should have been brought at law, the defendant waives the error as to form, unless he objects by answer or otherwise before final hearing.

Reaffirmed and extended in Richmond v. Dub. & Sioux City R. R. Co., 33 Iowa 489, 490, holding further that an objection that an action is brought in equity when it should have been brought at law must—under Secs. 2615 and 2619 of the Code of 1860—be made by motion at the time defendant files his answer, or it will be waived.

Reaffirmed and extended in Corey v. Sherman, 96 Iowa 121-123, 32 L. R. A. 490, 64 N. W. 831, holding further that under Secs. 2514-2516 of the Code of 1873, an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer of the action to the proper docket; that an error of this kind may be corrected by the plaintiff or the defendant may have the correction made at or before the filing of his answer: And that under Sec. 2519 thereof, an error as to the kind of proceedings adopted in the action is waived by a failure to move for its correction at the time and in the manner prescribed.

Cited with approval in Herring v. Neely, 43 Iowa 158, the case turning on other points.

Cited in Green v. Marble, 37 Iowa 96; Tugel v. Tugel & Tagen, 38 Iowa 350, the court holding that an objection that plaintiff's remedy was by action in equity instead of at law, or *vice versa*, cannot be raised for the first time upon appeal to the Supreme Court.

Cross reference. See further on this question, annotations and cross references under Rules 1-3 of Byers v. Rodabaugh (17 Iowa 53), Vol. II, p. 491.

3. Real Estate—Possession as Notice—Rights of Purchasers.—One who purchases real estate from one not in possession thereof is chargeable with notice of and takes subject to the rights, title and equities of a third person who is in possession thereof at the time of the purchase, pp. 485, 486.

Reaffirmed in Phillips v. Blair, 38 Iowa 656.

Cross reference. See further on this question, annotations and cross references under Dickey v. Lyon (19 Iowa 544), Vol. II, p. 763.

RYAN v. HARROW, 27 IOWA 494, 1 AM. REP. 302

1. New Trial—Misconduct of Jury or Juror as Ground—Juror Drinking Intoxicants.—The drinking intoxicating liquors by a juror or jurors, after the jury has retired for deliberation, is a ground for new trial, although such juror or jurors may not so drink to excess, pp. 495, 500-502.

Reaffirmed and qualified in State v. Morphy, 33 Iowa 273, 11 Am. Rep. 122; Van Buskirk v. Dougherty, 44 Iowa 44; State v. Bruce, 48 Iowa 537, 538, 30 Am. Rep. 403, (cited in opinion on rehearing, 540), holding that the drinking of intoxicating liquors by a juror or jurors during the progress of or adjournment of a cause, *and before final submission* for deliberation and verdict, is not a ground for a new trial, unless it be shown that such drinking so affected the juror's or jurors' brain or brains that he or they were thereby incapable of calm and dispassionate reasoning, or that the party complaining was otherwise prejudiced thereby—And the rule applies in both civil and criminal cases.

Reaffirmed and narrowed in Hopkins v. Knapp & Spalding Co., 92 Iowa 214, 60 N. W. 620, holding that the use of intoxicating liquors by a juror while the jury is deliberating, unless it is so used as a medicine and in case of actual sickness, is a ground for a new trial: And that where a juror, while the jury is deliberating uses intoxicating liquors, adopting a plea of sickness as a subterfuge, the verdict will be set aside.

Cited in Stafford v. City of Oskaloosa, 57 Iowa 753, 11 N. W. 670, a case wherein a verdict was set aside on account of too friendly an intimacy and association between an attorney and a juror during the trial.

Cross reference. See further on this question, note under Rule 3 of State v. Baldy (17 Iowa 39), Vol. II, p. 487.

CLOSE v. SAM, 27 IOWA 503

1. Trespass—Continuing Trespass on Land—Action for—Measure of Damages.—In an action for damages for a trespass on land, the plaintiff can only recover damages to the time he brings his action. If the trespass be thereafter repeated or continued the plaintiff may bring another action for damages thereby occasioned, p. 506.

Reaffirmed and explained in Harvey v. Mason City & Ft. Dodge R. R. Co., 129 Iowa 472-476, 113 Am. St. Rep. 483, 3 L. R. A. (New Series) 973, 105 N. W. 961, holding that damages for injury of a permanent character to real property, and especially where the wrong complained of is in the nature of a nuisance which will continue indefinitely without change from any cause but human labor, are recoverable once for all, and that ordinarily the measure of such recovery is the decrease in the fair market value of the property on account of such injury; and in such case the damages are said to be original: But where the injury from the alleged nuisance is temporary in its nature or is of a continuing or recurring character, the damages are ordinarily regarded as continuing, and one recovery against the wrong-doer is not a bar to successive actions for damages thereafter accruing from the same wrong: And holding that damages arising from the occasional flooding of land by reason of an insufficient culvert upon the land of an adjacent proprietor are not original, although if the claim for damages be made and the action be tried on the theory that they are original, the parties will be bound thereby.

(Note.—This citing case fully discusses this question, and collates many authorities on it. This present case involved the flooding of premises by damming water, and the text should, perhaps, relate to nuisance; but the court's opinion uses "trespass" instead.—Ed.)

2. Adverse Possession—What Constitutes—Color of Title—Good Faith.—If one has open, continuous and actual possession of land for the statutory period of ten years, and holding in good faith and under color of title, he acquires title by prescription or adverse possession, whether the true owner had notice thereof or not.

It is not necessary that the title of the party in possession of property shall be valid and perfect in order to enable him to rely upon the statute of limitation, p. 510.

Reaffirmed in Tremaine v. Weatherby, 58 Iowa 620, 12 N. W. 612, holding that to constitute color of title, it is not requisite that the title under which the party claims should be a valid one, and its want of validity may result from its original inherent defects.

Reaffirmed and explained in Grube v. Wells, 34 Iowa 149-152, holding that in order to constitute adverse possession of land such as

will bar the true owner from its recovery, the possession must be under color or claim of title, and be open, notorious, adverse and hostile to the rights of the former; and must be continued for the statutory period of ten years.

Reaffirmed and explained in Teabout v. Daniels, 38 Iowa 161, 162; Colvin v. McCune, 39 Iowa 505, 506; Spittler v. Scofield, 43 Iowa 572, holding that in order to constitute adverse possession of land it must be under color or claim of title, and actual, continued, visible, notorious, distinct and hostile during the statutory period required to bar an action for the recovery of real estate: But such an adverse possession of uninclosed, uncultivated or wild land, may be by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable, and such as are necessary to acquire the profits it yields in its condition—such acts being continued and uninterrupted for the statutory period of limitation, and being done under color of title or claim of right: And that possession of land is the holding of and exclusive exercise of dominion over it.

Reaffirmed, explained and qualified in Litchfield v. Sewell, 97 Iowa 250, 66 N. W. 106, holding that while it is true that a void deed or one given without right or title by the grantor, or even a tax deed which is void on its face, may be sufficient to give color of title, yet, such a rule has no application to one who actually knows that he has no claim or title or right to a title to the land.

Reaffirmed and explained in Fullmer v. Beck, 105 Iowa 521, 75 N. W. 368, holding that adverse possession must be with an intent to claim title, under claim of ownership of the land.

Reaffirmed and varied in Jamison v. Perry, 38 Iowa 18, holding that under Sec. 2740 of the Code of 1860, an action upon a written contract, or for the recovery of real estate must be commenced within ten years after the cause of action accrues, or it will be barred; and that this rule applies to an action to foreclose a mortgage on or deed of trust to, land.

Reaffirmed and qualified in Smith v. Young, 89 Iowa 340, 341, 56 N. W. 507, holding that although title by adverse possession may be obtained under a claim of title or right that is invalid, but the contrary is the rule when the claimant actually knows that he has no title or right to a title: And holding, also, that joint occupancy of land by two persons forbids either to claim adverse possession thereof against the other.

Cross references. See further on this question, annotations and cross references under Rule 1 of *McNamee v. Moreland* (26 Iowa 96), ante. p. 308; Rule 1 of *Booth & Graham v. Small* (25 Iowa 177), ante. p. 254.

3. Trial—View of Premises or Place by Jury—Purpose of—What Jury to Consider in Arriving at Verdict.—Under Sec. 3061 of the Code of 1860, when the court orders the jury upon the trial

of a civil action to have a view of the real property which is in controversy, or of the place in which any material fact occurred, it is done to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross examination or correction of error, if any, could be afforded either party.

The jury must base their verdict upon the evidence delivered to them in open court, and they cannot take into consideration facts known to them personally, but outside of the evidence produced to them in court, pp. 507, 508.

Reaffirmed in Thompson v. City of Keokuk, 61 Iowa 189, 190, 16 N. W. 83.

Reaffirmed in Harrison v. Iowa Midland R. R. Co., 36 Iowa 326, a case wherein the jury viewed premises, and the court instructed them upon the effect to be given by them to their inspection, as set out in the text, and the instruction was held to be proper.

Reaffirmed and explained in Guinn v. Iowa & St. L. Ry. Co., 131 Iowa 683, 109 N. W. 210, wherein a view by the jury of premises was permitted, and a charge to the jury is held proper in the following language: "The purpose of viewing the premises is to enable the jury better to understand the testimony of the witnesses respecting the same, and more intelligently apply such testimony to the issues before them, and not to make them silent witnesses in the case. You will consider the evidence in the light of your view of the premises, but you must determine the facts of the case from the evidence alone. You must not base your verdict in any degree upon your examination of the premises."

Reaffirmed and extended in Morrison, Adm'x, v. B. C. R. & N. Ry. Co., 84 Iowa 667, 668, 51 N. W. 76, holding further that in a case wherein the jury view the premises or place, it is reversible error for the court to instruct the jury that they may consider their examination or inspection for any other purpose than as laid down by the text.

Cited in State v. Harvey, 112 Iowa 417, 84 Am. St. Rep. 350, 52 L. R. A. 500, 84 N. W. 536, the court holding that it is not proper, and is reversible error, in a bastardy proceeding to exhibit a child nine months old to the jury for the purpose of the jury detecting a resemblance between it and the alleged putative father—But see, in this connection, State v. Smith, 54 Iowa 104, 37 Am. Rep. 192, 6 N. W. 153; State v. Danforth, 48 Iowa 43, not citing the text.

Cited in Moore v. C. St. P. & K. C. Ry. Co., 93 Iowa 187, 61 N. W. 993, where the view provided by Sec. 2790 of the Code of 1873, corresponding to the section of the text, was not conducted as allowed

thereby, and the judgment was reversed for proceedings connected therewith not allowed by the statute.

And see 151 Iowa 327, 128 N. W. 854.

PRINCE *v.* GRIFFIN, 27 IOWA 514

1. Contracts for Sale of Land—Time of Payment by Purchaser May Be Made of Essence—Forfeiture.—In a contract for the sale of land the parties may make *time of the payment* of the purchase price by the purchaser, *of the essence*, declare that the contract be forfeited upon his failure to pay *at the time agreed upon*, and that he thereafter hold as a lessee holding over after the expiration of a lease, with right of the vendor to proceed by forcible entry and detainer, pp. 515, 518, 519.

Reaffirmed and extended in Carter *v.* Walters, 91 Iowa 729 (Abstract), 59 N. W. 202, holding further that when time of payment by the purchaser is made *of the essence* of a contract for the sale of land, upon failure to comply therewith at such time by the purchaser, the vendor has a right to insist upon a forfeiture.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

STATE FOR USE, ETC., *v.* ORWIG, 27 IOWA 528

1. Appeal—Chancery Cause—Trial De Novo, When.—Upon an appeal from a final decree or judgment in an equity action triable by the first method prescribed by Sec. 2999 of the Code of 1860, the cause will be tried *de novo* by the Supreme Court: But in order that it may be so tried upon the evidence, not only the pleadings and other papers in the case must be certified as part of the record, but the evidence in its original form must be before the higher court, pp. 530, 531.

Reaffirmed in Howe & Co. *v.* Jones, 66 Iowa 160, 23 N. W. 378, holding—under the Code of 1873—that upon an appeal in a chancery action tried according to the first method prescribed by Secs. 2999 and 3000 of the Code of 1860—all evidence in writing—a trial *de novo* will not be had, when the record does not contain *all of the evidence adduced below*.

Reaffirmed, explained and extended in Mally *v.* Mally, 31 Iowa 61, 62, holding that under the Code of 1860, all equitable actions except divorce cases and actions for foreclosure of tax titles and of mortgages, are triable according to the first method of Sec. 2999 thereof—all written evidence:—And that if a cause is strictly equitable, the fact that it incidentally involves the foreclosure of a mortgage does not authorize its trial by the second method of the above section (all oral evidence): And that in this last class of cases the court may refer to a master or referee, without consent of the parties: And holding further that failure to object to oral testimony at the time of its intro-

duction in an equitable action triable by the first method of Sec. 2999 of the Code of 1860, thereby waives the objection thereto.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of *Blake v. Blake* (13 Iowa 40), Vol. II, p. 115.

ALLEN *v.* BERRYHILL, 27 IOWA 534, 1 AM. REP. 309

(Later Appeal, 29 Iowa 157.)

1. Contracts—Insanity—Person Contracting with Person of Unsound Mind Cannot Set up Fact When Sued.—One contracting with a person of unsound mind cannot set up such fact in an action thereon by the guardian of the insane person, pp. 537, 539.

Reaffirmed and explained in Burkhardt *v.* Burkhardt, 107 Iowa 375, 77 N. W. 1071, holding that a party to a contract with an insane person cannot take advantage thereof, to the prejudice of such insane party.

Reaffirmed and varied in Tiffany *v.* Tiffany, 84 Iowa 129, 50 N. W. 555, holding that where an appeal to the Supreme Court is prosecuted by an insane party, and he is thereon represented by counsel, the fact that it is not taken and prosecuted by a guardian *ad litem* will not be ground for dismissal, but such guardian may be required to appear in the case upon the appeal, or another one may, upon motion, be appointed.

2. Principal and Surety—Surety for Insane or Other Person Incapable of Contracting—Absolute Liability of Surety.—While, as a general rule, it is true that the discharge of a principal releases a surety, yet where a person *sui juris* becomes surety for a married woman, a minor or other person incapable of contracting, the surety is bound, notwithstanding a successful plea of disability on the part of the principal, p. 539.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Rule 1 of *Jones v. Crosthwaite* (17 Iowa 393), Vol. II, p. 546.

Annotations to Decisions Reported in Volume 28 Iowa

TISDALE, ADM'X, *v.* CONNECTICUT MUTUAL LIFE INS. CO.,
28 IOWA 12

(Former Appeal, 26 Iowa 170.)

1. Trial—Refusal to Allow Introduction of Evidence After Both Parties Have Rested—Discretion of Trial Court—Abuse—Reversal.—The refusal of the trial court to allow a party to introduce certain evidence, or read the depositions of certain witnesses, after both parties have rested upon the trial of a civil action by jury, is not ground for reversal upon appeal, unless the record shows that the trial court abused his judicial discretion vested in him in such an instance, resulting in prejudice to the party appealing and complaining, p. 17.

Reaffirmed and varied in *In re Cummings' Estate*, 120 Iowa 427, 94 N. W. 1120, holding that the refusal of the trial court to set aside a decree in a will contest after it has been signed and entered, and to permit a party to introduce other evidence, is not ground for reversal in the absence of a showing of abuse of discretion and resulting prejudice to the party appealing.

HENDERSON *v.* OLIVER, 28 IOWA 20

1. Tax Sale of Land—When Title Vests in Purchaser—Limitation of Actions.—Under Sec. 785 of the Code of 1860, the title to land sold for taxes vests in the tax sale purchaser, when the tax deed is *executed and recorded* in the proper record of titles; and the statute of limitation (five years) prescribed by Sec. 790 of that Code commences to run against the owner of the land sold and for its recovery, from that time, and not from the date of sale.

And the rule applies to an action in equity by the owner of the land, to set aside a tax sale and deed thereof and thereto, pp. 20, 21.

Special cross reference. For cases citing, sustaining, explaining and distinguishing the text, and many others on this question, see annotations under Rule 6 of *Eldridge v. Kuehl* (27 Iowa 160), ante. p. 381.

2. Tax Sale of Land—Treasurer Making Sale Becoming Purchaser or Directly or Indirectly Interested in Purchase of—Effect.—If a county treasurer making a sale of land for taxes becomes directly or indirectly interested in the purchase thereof, the

sale is void under Sec. 775 of the Code of 1860. And this rule applies where the treasurer sells thereat to himself, or to a party who purchases for him or for his interest, p. 21.

Partially overruled in Waggoner v. Mann, 83 Iowa 22, 48 N. W. 1067, holding that a sale of land for taxes as in this text is *voidable*, not *void*: And holding further that the clerk of the county board of supervisors may purchase land at a tax sale for the county and to protect its rights and interest.

(Note.—See further specially on this question, Truesdell v. Green, 57 Iowa 215, 10 N. W. 630; Ellis v. Peck, 45 Iowa 142; Van Shaak v. Robins, 36 Iowa 201.—Ed.)

PIFFNER v. KRAFFEL, 28 IOWA 27

1. Fraud—Acceptance of Service of Notice Procured by—Judgment Under—Collateral Attack—Res Adjudicata.—Where in an action concerning homestead, a wife who is uneducated, is induced to accept service of notice of a cross petition by fraud, and the cross petition does not claim any relief as against any interest or claim of hers, then in an action against her and her husband by the purchaser of the homestead at an execution sale under a judgment rendered upon such accepted service of notice, to recover its possession, she may set up such facts and fraud as a defense, and ask to and be allowed to redeem from the sale.

It is against the spirit and plain intent of our Code to allow parties to claim as fruits of their litigation that which was not by the fair and obvious import of the pleadings put in issue and litigated between them, pp. 30, 33, 34.

Reaffirmed and explained as to second paragraph in Kern & Son v. Wilson, 82 Iowa 412, 413, 48 N. W. 920, holding that in order to make the plea of *res adjudicata* applicable, the actual point in issue in a subsequent action must have been determined *on its merits* in a former action between the same parties.

Cited in Kwentsky v. Sirovy, 142 Iowa 392, 121 N. W. 30, the court holding that the general rule is that a judgment obtained by fraud, collusion or perjury, inherent in the cause of action cannot be attacked in a collateral proceeding; but if the fraud or duress is practiced in the very act of obtaining or procuring the judgment, the judgment may be collaterally attacked: That the fraud or duress which will authorize the setting aside of a decree or judgment must be such as really prevented the unsuccessful party from having a trial.

Cross references. See further on this question, annotations under Moomey v. Maas (22 Iowa 380), ante. p. 43; Standish v. Dow (21 Iowa 363), Vol. II, p. 915.

2. Tax Sale of Homestead—Right of Wife to Redeem—Time Allowed for.—Where homestead is sold for taxes the wife of the

owner may redeem from the sale; and under Sec. 779 of the Code of 1860, this right of redemption continues until one year after she becomes discoverd, p. 34.

Special cross reference. For cases citing, etc., the text, and many more, see annotations under Rules 2-4 of *Adams v. Beale* (19 Iowa 61), Vol. II, p. 692.

Cross references. See further on this question, annotations under *Rice v. Nelson* (27 Iowa 148), ante. p. 379; *Burton v. Hintrager* (18 Iowa 348), Vol. II, p. 642; *Byington v. Walsh* (11 Iowa 27), Vol. I, p. 764; *Byington v. Rider* (9 Iowa 566), Vol. I, p. 629.

KELTNER v. STORY COUNTY, 28 IOWA 35

1. Swamp Lands—Act of Congress Granting to State—Breach of Conditions by State—Who can Complain.—Even if the State or a county holding under the State, violates the conditions and limitations of the Act of Congress of September 28, 1850, granting swamp lands to the State, no one but the donor—the United States—can complain thereof, p. 36.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under *Barrett v. Brooks* (21 Iowa 144), Vol. 2, p. 883.

SHAUL v. BROWN, 28 IOWA 37, 4 AM. REP. 151

1. Malicious Prosecution—Action for—Defenses—That Indictment or Information was Defective or Insufficient is Not.—In an action for damages for malicious prosecution of plaintiff on a specific criminal charge, the defendant who acted maliciously and without probable cause cannot defend by showing that the indictment or information on which plaintiff was prosecuted was defective or insufficient, either in substance or form, p. 42.

Reaffirmed in *Holden v. Merritt*, 92 Iowa 710, 711, 61 N. W. 392.

Distinguished and narrowed in *Newman v. Davis*, 58 Iowa 449, 10 N. W. 853, holding that where a person states the facts to a justice of the peace concerning the question of whether or not another is guilty of an offense or crime, but without charging any specific offense against the latter, and the justice thereupon commences a criminal prosecution, the informant or person who made the complaint is not answerable in damages in an action for malicious prosecution by the accused: That if a justice of the peace by mistake of judgment, conceives an act to be a felony which is not a felony, and in consequence of that mistake, causes an innocent person to be arrested or imprisoned, the law will not hold the person who made the complaint responsible therefor in such an action.

2. Malicious Prosecution—Action for—Want of Probable Cause—Instructions.—In actions for malicious prosecution, as in

other actions, it is desirable and proper to call the attention of the jury to the facts which the evidence tends to establish, as they may be claimed by the respective parties or otherwise, and to state the law applicable to such different hypotheses of fact: Or in other words, it is the duty of the judge to inform the jury if they find the facts to be proved and the inferences to be warranted by such facts, that the same do or do not amount to probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge, p. 48.

Reaffirmed and explained in Johnson v. Miller, 63 Iowa 537, 538, 50 Am. Rep. 758, 17 N. W. 38, holding that upon the trial of an action for malicious prosecution it is the better practice for the court to group together in the instructions the facts which the evidence tends to prove, and then to instruct the jury, if they find that such facts have been established that they must find that there was or was not probable cause.

Cross reference. See further in this connection, annotations under Rule 2 of Owen v. Owen (22 Iowa 270), ante. p. 30.

3. Malicious Prosecution—Want of Probable Cause—Malice May be Inferred from.—Upon the trial of an action for damages for malicious prosecution where the proof shows that the defendant acted without probable cause, the jury may infer malice therefrom; but they are not bound to so do, p. 45.

Reaffirmed in Smith v. Howard, 28 Iowa 55.

Cross references. See further on this question, annotations under Richey v. Davis (11 Iowa 124), Vol. I, p. 785; Center v. Spring (2 Iowa 393), Vol. I, p. 233.

4. Trial—Practice—Evidence—Deposition in Previous Case Between Same Parties—Admissibility.—Upon the trial of a civil action a deposition taken in a previous case between the same parties in relation to the same subject-matter is admissible in evidence, without a notice to the party against whom it is so used and read, p. 50.

Reaffirmed and extended in Atkins v. Anderson, 63 Iowa 743, 19 N. W. 325, holding further that a deposition taken in a former action may be read as evidence in a subsequent action involving the same subject-matter and wherein the same persons or their privies are parties, and against any of them.

Cited in Howe v. Mut. Reserve Fund L. Ass'n, 115 Iowa 287, 88 N. W. 338, the case involving and turning upon another point.

Partially overruled in Searle v. Richardson, 67 Iowa 172, 173, 25 N. W. 114, holding that although depositions which have been regularly taken in one cause may be used in the trial of another cause between the same parties or their privies, still, under our practice—Sec. 3751 of the Code of 1873—a party should not be permitted to use depositions on the trial of one cause which have been taken in

another, without having filed them in the cause in which he proposes to use them, or obtaining leave before the commencement of the trial to so use them.

SMITH v. HOWARD, 28 IOWA 51

1. Pleadings—Petition—Amendment to Conform to Proof—Discretion of Trial Court—Abuse—Reversal.—Under the Code of 1860, the trial court may at any time in furtherance of justice and in the exercise of the large judicial discretion vested in him in such cases, allow the plaintiff to amend his petition to conform to the proof; and his ruling thereon will not be ground for reversal, unless the Supreme Court is satisfied that such amendment was not in furtherance of justice. This rule applies where the plaintiff is allowed to amend his petition for such purpose while the second argument by counsel of defendant is being made to the jury, pp. 52, 53.

Reaffirmed and extended in Davis v. Ch., R. I. & P. Ry. Co., 83 Iowa 745 (abstract), 49 N. W. 78, holding further that pleadings may—under the Code of 1873—be amended to conform to the proof and in furtherance of justice, at any time, and even after verdict and judgment.

(Note.—There are numerous cases under the various codes sustaining, but not citing, the text.—Ed.)

2. Malicious Prosecution—Want of Probable Cause—Malice May be Inferred From—Malice in Fact and in Law.—Upon the trial of an action for malicious prosecution, the jury may infer malice from proof of want of probable cause; but they are not bound to so do. However, when the jury so infer malice from such proof, it constitutes as much malice in fact, as if it were proven from any other facts and circumstances in the case, pp. 54, 55.

Reaffirmed in Shaul v. Brown, 28 Iowa 45, 50, 4 Am. Rep. 151.

Special cross reference. For further cases citing and sustaining the text, and many others on the question, see annotations under Richey v. Davis (11 Iowa 124), Vol. I, p. 785.

Cross references. See further in this connection, annotations under Shaul v. Brown (28 Iowa 37), ante. p. 435; Center v. Spring (2 Iowa 393), Vol. I, p. 233.

HARPER v. PERRY, 27 IOWA 57

1. Attorney and Client—Purchase by Attorney of Client's Property Sold in Course of Litigation—Validity and Effect.—While the relation exists an attorney is not permitted to take advantage of the client's affairs against his interest, to make money. And where an attorney, against the interest of his client, purchases property sold in the course of litigation in which he is retained, the sale will be

held void, or the attorney will be held as the trustee of his client and required to account as such, pp. 60, 61.

Reaffirmed and explained in Polson v. Young, 37 Iowa 198, 199, holding that transactions between attorney and client, as in all other cases where fiduciary relations exist between parties, one of whom possesses superior knowledge and ability and the other is subject to his influence, are regarded with a scrutinizing and jealous eye by courts of equity, and the client is protected whenever advantage has been taken of him through the influence or knowledge of the attorney, possessed by reason of their peculiar relations.

Reaffirmed and extended in Reickhoff v. Brecht, 51 Iowa 635, 636, 2 N. W. 524, holding further that in all cases the burden is upon the attorney making a purchase of a client to vindicate the transaction from all suspicion, and if the attorney cannot produce evidence that puts the transaction beyond all doubt, it will be set aside or he will be converted into a trustee.

Reaffirmed and extended in Jordan v. Cathcart, et al., 126 Iowa 604-606, 102 N. W. 512, holding further that where an attorney buys real estate of a fraudulent grantee of his client and with full knowledge that his vendor (grantee) obtained a conveyance thereof by fraud practiced on his (the attorney's) client, the purchase and the sale from the fraudulent grantee to the attorney will be set aside in equity, upon complaint of the client—except as against a subsequent innocent purchaser of the property from the attorney.

Cited in Whitcomb v. Collier, 133 Iowa 312, 110 N. W. 839, setting aside a settlement obtained by fraud, duress and undue influence; the court largely resting the opinion on the fact that an attorney who had been employed by the person from whom the settlement was obtained and who had thereby come into knowledge of confidential information was later and at the time the settlement was made, employed by the party benefited thereby.

2. Real Estate—Possession as Notice—Rights of Purchasers.—

One who purchases real estate from one not in possession thereof, is chargeable with notice of and takes subject to the rights, title and equities of a third person who is in possession thereof at the time of the purchase, p. 62.

Reaffirmed in Phillips v. Blair, 38 Iowa 656; Benbow v. Boyer, 89 Iowa 498, 56 N. W. 545.

Cross reference. See further on this question, annotations and cross references under Dickey v. Lyon (19 Iowa 544), Vol. II, p. 763.

3. Conveyances—Conveyance of Land to Lender of Purchase Money as Security for Loan—Breach of Covenant of Warranty—Right of Grantee, Lender, to Sue.—Where a deed to land is executed to one who lends the purchase price and as a security for the loan, the grantee will be treated as a mortgagee, and may sue for breach of covenant of warranty in the deed, p. 62.

Reaffirmed and extended in Rose v. Schaffner, 50 Iowa 486, holding further that a mortgagee of land is entitled to the protection of the covenants of warranty in the deed under which his mortgagor holds at the time of the execution of the mortgage.

4. Deed to Land—Consideration Named in—Evidence—True Consideration May be Shown—Action for Breach of Covenant of Warranty.—The consideration named in a deed is only *prima facie* evidence of the amount paid. And in an action upon the covenant of warranty in a deed, it is competent to show that the true consideration was greater than the amount named in the deed, p. 63.

Reaffirmed and explained in Trayer v. Reeder, 45 Iowa 273-275, holding that the recital in a deed as to the consideration, is only *prima facie* evidence thereof, and may be overcome by parol evidence of the real consideration therefor.

Reaffirmed and explained in Walker v. Walker, 104 Iowa 512, 73 N. W. 1075, holding that a deed the consideration of which is for support of the grantor, may be set aside upon breach of the agreement by the grantee, although a different consideration may be expressed in the instrument.

Reaffirmed and extended in Hall v. Barnard, 138 Iowa 525, 116 N. W. 605, holding further that the recital of consideration in a bill of sale is *prima facie*, but not conclusive, evidence of the actual consideration.

Distinguished and narrowed in Lewis v. Day, 53 Iowa 576, 577, 5 N. W. 754, holding that where a deed is made pursuant to a prior written contract, parol evidence is inadmissible to add new conditions or terms to such contract, although they be claimed to be part of the consideration for the contract and deed.

Cross references. See further on this question, annotations under Puttman v. Haltey (24 Iowa 425), ante. p. 210; Rules 1 and 2 of Lawton v. Buckingham, Ex'r (15 Iowa 22), Vol. II, p. 296.

STATE v. SHAW, 28 IOWA 67

1. Conveyances—Constructive Notice—Extent of.—A purchaser of land is charged with constructive notice of everything appearing in any part of deeds or instruments proving and constituting the title purchased, and which is of such a nature that if brought directly to his knowledge would amount to actual notice, pp. 71, 72.

Reaffirmed in Huber v. Bossart, 70 Iowa 722, 29 N. W. 608.

Reaffirmed and explained in Ætna Life Ins. Co. v. Bishop, 69 Iowa 647, 29 N. W. 761, holding that any one who claims a title or right under another must be presumed to have knowledge of the recitals in a conveyance to his immediate grantor.

Cross reference. See Rule 2 hereof.

2. Conveyances—Constructive Notice—Facts Putting Subsequent Purchaser or Incumbrancer upon Inquiry.—If a subsequent purchaser or incumbrancer of land has knowledge of facts which would put an ordinarily prudent man upon inquiry, he is chargeable with notice of the rights of a prior purchaser or incumbrancer thereof which the inquiry, if pursued, would have discovered. So a subsequent purchaser or incumbrancer of land is chargeable with notice of a prior mortgage thereon which contains a mistake in description of the property, when the description in the prior mortgage, and other facts and circumstances known to such subsequent purchaser or incumbrancer should have put him upon inquiry, pp. 72, 73.

Reaffirmed in Clark v. Stout, 32 Iowa 214, 215, 7 Am. Rep. 180; Albia State Bank v. Smith, 141 Iowa 261-262, 119 N. W. 610.

Reaffirmed and explained in Truth Lodge, No. 213, A. F. & A. M., 119 Iowa 235, 97 Am. St. Rep. 303, 93 N. W. 107, holding that possession of land by a person other than the vendor, is sufficient to put a purchaser thereof upon inquiry and operates as notice of the rights, title and equities of the person in possession.

Distinguished in Thomas v. Desney, 57 Iowa 62, 10 N. W. 317, holding that if a party is not charged with constructive notice by what appears by the index book of judgments, he is not bound to look further, and is not bound by what appears of record.

And see 149 Iowa 676.

Unreported citation 128 N. W. 1103.

Cross references. See further on this question, annotations under Barney v. Miller (18 Iowa 460), Vol. II, p. 667; English v. Waples (13 Iowa 57), Vol. II, p. 118; and see, also, annotations under Huston v. Seeley (27 Iowa 183), ante. p. 388.

3. Mortgage of Land to School Fund—Sale for Taxes—Effect—Right of Tax Title Holder—Secs. 810, 811 of the Code of 1860, Construed—To What Sales Operative.—Under Secs. 810, 811 of the Code of 1860, the purchaser at a tax sale of land which is mortgaged to the school fund, takes subject to such mortgage.

In such case the purchaser acquires only the right of the mortgagor, the right to redeem from the mortgage.

And the above rule is applicable to all sales of land for taxes made after Sec. 811 of the Code of 1860 took effect, where the land sold is mortgaged to secure a loan for money borrowed from the school fund, whether the taxes became delinquent before or after its taking effect, p. 77.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Jasper County for use, Etc., v. Rogers (17 Iowa 254), Vol. II, p. 523.

4. Statutes—Construction of—Statutes in Pari Materia, Construction of—What Are.—All statutes *in pari materia* are to be taken examined and construed together, for the purpose of arriving at the

legislative intention, and although they were enacted at different times and do not refer to each other.

Statutes are *in pari materia* when they relate to the same person or thing, or to the same class of persons or things, p. 78.

Reaffirmed in Chamberlain v. Iowa Telephone Co., 119 Iowa 627, 93 N. W. 599.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

5. Statutes—Construction of—Repeal by Implication Not Favored.—The repeal of a statute by implication is not favored by the courts, and effect will, if possible, be given to several statutes on the same subject.

In order to work the repeal, by implication, of an old law by a new one, there must be an absolute repugnancy between the two, pp. 78, 79.

Reaffirmed and explained in Diver v. Keokuk Sav. Bank, et al., 126 Iowa 696, 3 Am. & Eng. Ann. Cas. 669, 102 N. W. 544, holding that repeals by implication are not favored; and when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, no purpose of repeal being clearly expressed or indicated, it is the duty of the court, if possible, to give effect to both: That it will not be presumed that the Legislature intended a repeal of a prior statute by a later one on the same subject, unless the last statute is so broad in its terms and so explicit in its language as to show that it was intended to cover the whole subject, and therefore to displace the prior statute.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross references. See further on this question, annotations and cross references under Rule 2 of Burk v. Jeffries (20 Iowa 145), Vol. II, p. 794; Rule 1 of Duncombe v. Prindle (12 Iowa 1), Vol. II, p. 1.

6. Municipal Corporations—Tax Sale of Land—Act of 1858 as to Effect of Tax Deed and Manner of Foreclosure, Construed.—Chap. 105, Acts of 1858, Sec. 1144 of the Code of 1860, was intended to give a uniform effect to deeds made to purchasers of real estate sold for municipal taxes, and a like method for the foreclosure of the equity of redemption, under whatever municipal charter such a sale might be made. Under such act the provisions of Secs. 503, 506 of the Code of 1851 apply, and a purchaser at such tax sale made after it took effect is entitled to a deed, and after six months from the date thereof has a right to file his petition as in case of the foreclosure of a mortgage, p. 80.

Special cross reference. For cases citing the text, and others, see annotations under Crosthwaite v. Byington (11 Iowa 532), Vol. I, p. 855.

Cross reference. See further on this question, annotations under Rule 1 of *Street v. Hughes* (20 Iowa 131), Vol. II, p. 790.

EX PARTE HOLMAN, 28 IOWA 88, 4 AM. REP. 159

1. State and Federal Courts—Jurisdiction—Respective Rights and Powers—Habeas Corpus from State Court to Release from Custody Under Federal Court Writ—Contempt.—*Habeas corpus* will not issue from a state court to test the question of whether or not a person is unlawfully detained under a process, or warrant, issued from a United States court.

When a court, *having jurisdiction* of a cause, is proceeding to arrest a party for contempt, no other court can intermeddle with, or stay, the proceeding, or on *habeas corpus* or in any other way, discharge the party who is being proceeded against.

In the exercise of the jurisdiction confided respectively to the state courts and those of the United States (where the latter have not appellate jurisdiction) neither has any right or power to control or interfere with the proceedings of the other, pp. 96-99, 105.

Reaffirmed in *Clark v. Wolf*, 28 Iowa 201-204 (cited in dissenting opinion, 208, 209).

Reaffirmed in *Shimer v. Hammond*, 51 Iowa 405, 406, 1 N. W. 660, holding that a state court has no power to enjoin the proceedings from a Federal court.

Reaffirmed and narrowed in *State ex rel. Whitcomb v. Seaton, Sheriff*, 61 Iowa 569, 16 N. W. 739; *Turney v. Barr*, 75 Iowa 761, 762, 38 N. W. 551, holding that where one is imprisoned under an order or judgment of a court who acts without jurisdiction or authority to such an extent that the order or judgment is *void*, he (the imprisoned person) may be released upon writ of *habeas corpus*.

Cited in *Brown v. Bryan*, 31 Iowa 558, not in point.

Cited in *In re Curley*, 34 Iowa 189, turning upon another point.

Cited in *Doyle v. Andis*, 127 Iowa 56 (dissenting opinion), 4 Am. & Eng. Ann. Cas. 18, 69 L. R. A. 953, 102 N. W. 184, the case involving other questions.

And see 146 Iowa 243, 124 N. W. 1084; 151 Iowa 41.

Unreported citation, 130 N. W. 135, not in point.

GOODE v. NORLEY, 28 IOWA 188

1. Decedent's Estate—Sale of Real Estate of—Proceedings for—Requisites—Notice to Heirs and Persons Interested—Void Sale, etc.—Probate proceedings to sell real estate of a decedent, where the heirs and persons having an interest therein are not served with notice, are void *ab initio*, as well as a sale made thereunder, pp. 195-198.

Reaffirmed in *Boyles v. Boyles*. 37 Iowa 594, 595; *Rankin v. Miller*, 43 Iowa 21, 22.

Reaffirmed and narrowed in Mullin v. White and Hudson, 134 Iowa 684, 112 N. W. 165, holding that a judgment in a probate proceeding for the sale of real estate of a decedent, is void as to the interest of an heir, or other person having an interest or lien thereon, who is not served with notice thereof.

Cited with approval in Gregg v. Myatt, 78 Iowa 704, 705, 42 N. W. 462 (opinion on rehearing), the first opinion holding that—under Sec. 2353 of the Code of 1873—when a party is personally served with notice of a proceeding to probate a will, and fails to appear and make contest therein, or when he appears therein and contests or waives contest of the will, he is thereby estopped from instituting an original action in the district court to set it aside.

Cross reference. See, in this connection, annotations under Shawhan v. Loffer (24 Iowa 217), ante. p. 170.

2. Decedent's Estate—Proceedings to Sell Real Estate of—Infant Heir Not Served with Notice—Effect of Appointment of and Defense by Guardian Ad Litem.—Where an infant heir of a decedent is not served with notice in a proceeding in the county court, to sell real estate of the latter, the appointment of and defense by a guardian *ad litem* for the infant are, as to him, void and of no effect, as well as all other proceedings, and the sale thereunder, pp. 198-200.

Reaffirmed and explained in Cummings v. Landes, 140 Iowa 84, 87, 117 N. W. 24, holding that when an original notice is so wanting in the requirements of the statute as to constitute *no notice* when served, the court is without jurisdiction even to appoint a guardian *ad litem*; and that service of an original notice after the date fixed for the defendant to appear and answer, is *no notice*, and all proceedings thereunder are void.

Reaffirmed and varied in In re Estate of Hunter, 84 Iowa 393, 394, 51 N. W. 21, holding that in an action involving the title to land of a person of unsound mind, the court has no power to appoint a guardian *ad litem* to defend for him, until service of notice on such person of unsound mind; and that in such case when the statutory guardian is acting contrary to the interest of such person, his defense must be made by the guardian *ad litem* appointed as provided above, or the decree therein will be void.

Reaffirmed and qualified in Rice v. Bolton, 126 Iowa 657, 658, 100 N. W. 635, holding that in an action wherein a minor is properly served with notice, that a premature appointment of and defense by a guardian *ad litem* and entry of decree, will not render the proceedings void or subject to collateral attack.

Cited in O'Rourke v. C., M. & St. P. R. R. Co., 55 Iowa 334, 7 N. W. 582, the case involving another question not in point, but upon analogy.

Unreported citation, 124 N. W. 355.

3. Decedent's Estate—Void Sale of Real Estate—Limitation of Actions.—Sec. 1356 of the Code of 1851 (Sec. 2388 of the Code of 1860), providing that no action for the recovery of any real estate sold by an executor can be sustained by any person claiming under the deceased, unless brought within five years next after the sale, does not apply to a sale of real estate of a decedent which is void *ab initio*, pp. 201-205.

Reaffirmed in Boyles v. Boyles, 37 Iowa, 594, 595.

Reaffirmed and extended in Valley Nat'l Bank v. Crosby, 108 Iowa 655-658, 79 N. W. 385, holding that a personal representative has no right to take possession of, control and collect the rents and profits of decedent's real estate, except as allowed by Secs. 2402-2404 of the Code of 1860; that such sections are to be strictly construed and complied with: And that an order of court allowing an executor or administrator to borrow money to pay certain interest and taxes, and to make repairs on the real estate, binding the rents and profits thereof for its payment, when the heirs of decedent have no notice of the application for such order, is *void*.

Reaffirmed and varied in Washburn v. Carmichael, 32 Iowa 478, 479; Rankin v. Miller, 43 Iowa 21, 22, holding that Sec. 2565 of the Code of 1860, limiting the time to commence actions for the recovery of real estate sold by a guardian, has no application to such a sale which is void *ab initio*; and that such a sale is one made by a guardian upon order of court when the ward had *no notice* that the order would be applied for.

Cross reference. See further on this question, annotations under Rule 2 of Pursley v. Hayes (22 Iowa 11), ante. p. 1.

SMITH v. WATSON, 28 IOWA 218

1. Pleadings—Petition—Informality which is Not Fatal and Cause for Dismissal.—A petition which is addressed "to the judge of the district court" of a named county, and which fails to name the parties, plaintiffs and defendants, at the head thereof, and is not headed and entitled a "petition" or "petition in equity," is only formally defective, when it is good in all other respects, and such defects are not cause for dismissal of the action, p. 219.

Reaffirmed and explained in Wise v. Outtrim, 139 Iowa 199, 117 N. W. 267, holding that an objection to an amended petition because it is not properly entitled with the name of plaintiff and defendant, and is not verified, is not fatal to the plaintiff's right to have his claim adjudicated in the usual manner: That the statutory provisions in this respect are directory only, and failure to observe them affects neither the jurisdiction of the court, nor the plaintiff's right of action.

Reaffirmed and varied in First Nat'l Bank v. Stone, 122 Iowa 559-561, 98 N. W. 363, 364, holding that the failure of the plaintiff

and his attorney to sign a petition is no cause for dismissal: Especially where the name of the attorney for plaintiff is shown on the cover of the petition, it is good in all other respects, and the original notice is signed by the attorney for plaintiff whose name is on the cover of the pleading.

Distinguished in *Jordan v. Brown*, 71 Iowa 423, 424, 32 N. W. 452, holding that when a petition is addressed to the circuit court, the district court has no jurisdiction to render judgment thereon, and all proceedings therein, as well as the judgment and proceedings thereunder are void: And that in such case the indorsements on the wrapper of the petition are no part thereof, and are of no effect to confer jurisdiction on the district court, or to render the proceedings, etc., valid.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

2. Default—Refusal to Set Aside—Reversal, When.—Where the defendant is personally served in time and enters an appearance, but fails to answer, and a default is taken, the refusal of the district court to set it aside, will not be cause for reversal upon appeal, unless an affidavit of merits was filed in support of the motion below to set it aside, and although an affidavit of defendant's attorney was made to the effect that he supposed the court had granted him sixty days from the date of the application in which to answer, on which he relied, whereas the entry made was for sixty days from the date of completed service, pp. 219, 220.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under *Bolander v. Atwell* (14 Iowa 35), Vol. II, p. 200.

Cross references. See further on this question, annotations under *Harper v. Drake* (14 Iowa 533), Vol. II, p. 281; *Rule 1 of Thatcher v. Haun* (12 Iowa 303), Vol. II, p. 51; *Rogers & Tallman v. Cummings* (11 Iowa 459), Vol. I, p. 844.

GILMORE & SMITH *v.* FERGUSON & CASSELL, 28 IOWA 220

(Same case, 28 Iowa 422.)

1. Usury—What Is Not—Contracts for Sale of Property to be Paid for at Future Time for Larger Sum than Cash Price, Not Usurious.—A person may rightfully sell his property to another for a certain sum in cash; or he may ask and receive a much larger sum on condition that it is not paid for till a future day; and the fact that the increased price payable at a future day is more than the legal interest on the cash price, will not make the contract usurious, p. 223.

Reaffirmed and varied in *Wetherby v. Smith*, 30 Iowa 132, 6 Am. Rep. 663; *McGill v. Griffin*, 32 Iowa 447, the court holding that a stipulation in a mortgage that in case the mortgagor fails to pay the

notes secured at maturity, and the mortgagee thereupon forecloses the mortgage, that the mortgagor shall pay a reasonable attorney's fee, does not render the contract usurious.

Cited in Conrad v. Gibbon, 29 Iowa 122, the court holding that a note secured by mortgage on land is not usurious on its face, when it is in the following language, to-wit: "\$480. Iowa City, August 8, 1855. One year after date, for value received, we promise to pay V. C. or order, at the banking-house in Iowa City, the sum of four hundred and eighty dollars; and if not paid when due, we promise to pay, as a penalty for the default, interest on the said sum at the rate of twenty per cent. per year, from maturity. This note may run at above rate for two years, interest to be paid annually": That in such case the twenty per cent. will be construed as a penalty, and interest be allowed at the rate of six per cent. per annum—the court saying: "There is no showing as to what this note was given for, whether it was part consideration for the land mortgaged to secure it, or for sale of other property, or for loan of money; or whether it was given in this form for the purpose or with the intent of evading the usury laws. In the absence of any such showing the authorities are uniform that it is not usurious."

THOMPSON v. CURTIS, 28 IOWA 229

1. Adjoining Land Owners—Party Wall—Wall Built by One Land Owner and Used by Neighbor—Right to Recover One-half Value from Latter Runs with Former's Land.—Where one adjoining land owner erects a party wall as part of a building, one-half on the land of an adjoining neighbor's land, and the latter uses the wall in support of and as part of a building later erected, the right to recover the value of one-half thereof runs with the land of the former—under Secs. 1914-1925 of the Code of 1860—and the grantee of the former's land may sue therefor, p. 231-233.

Reaffirmed and explained in Sullivan v. Graffort, 35 Iowa 533, 534, holding that each proprietor may use the wall for all the purposes of a wall in common, but their rights of user are thus limited as well before as after it has become a wall in common, by payment by each party of his part of the cost of its erection: And therefore holding that the adjoining land owner who erected a party wall will be enjoined from cutting large openings through it, upon complaint of his neighbor upon whose land half of it rests.

Reaffirmed and explained in Lederer & Strauss v. Colonial Inv. Co., and Mitchell & Co., 130 Iowa 159, 161, 8 Am. & Eng. Ann. Cas. 317, 106 N. W. 358, holding that under Secs. 2994-3000 of the Code of 1897, adjoining land owners do not own a party wall in common, thus entitling one of them to extend joists or timbers into it beyond the center thereof: That such owners own in severalty the portions of the wall resting upon their respective land.

Reaffirmed and varied in Bertram v. Curtis, 31 Iowa 47-49, holding that the resting of one-half of a neighbor's wall upon a contiguous vacant lot does not constitute an incumbrance on the vacant lot, so that the owner of the latter will be liable to his purchaser thereof, in the absence of stipulations or representations by the parties or by the vendor to the contrary: That in the absence of any representations by the vendor of a vacant lot as to the ownership of a wall resting one-half thereon, the presumption of law, under our statute, is that the ownership is in him who built it, or his grantees; for the builder has no legal right to demand, nor the owner of the vacant lot is under no obligation to pay for the half resting on the vacant lot, until the owner of such lot shall use it as a party wall, though he *may* do so, or join in building it: And that the obligation to pay for it, rests upon the grantee and owner of the vacant lot at the time of using it.

Reaffirmed and varied in Pew v. Buchanan, 72 Iowa 638, 34 N. W. 454, holding that the right to use a party wall runs with the land: And that when a party wall is built equally upon the lots of adjoining owners by one of them, and is afterward used for a building erected by his neighbor, who does not pay for the part of the value thereof as required by law, and conveys the lot to one having full notice of the facts, such purchaser is liable to his neighbor who erected it, in an action to recover one-half the cost thereof.

Cited in Capital City Inv. Co. v. Burnham, 143 Iowa 147, 121 N. W. 713, the court holding that under our rule a party wall extending not more than nine inches over on adjoining land is not an incumbrance.

(Note.—See further, Webster v. Temple, 141 Iowa 225; Younker v. White, 136 Iowa 23, 111 N. W. 824; Newburn v. Lucas, 126 Iowa 88, 101 N. W. 730; Miller v. Mills Co., 111 Iowa 654, 82 N. W. 1038; Swift v. Calnan, 102 Iowa 206, 63 Am. St. Rep. 443, 37 L. R. A. 462; Beggs v. Duling, 102 Iowa 13, 70 N. W. 732; Freeman v. Herwig, 84 Iowa, 435, 51 N. W. 161; Mischke v. Baughn, 52 Iowa 528, 3 N. W. 543; Gilbert v. Woodruff, 40 Iowa 320; McDunn v. City, 39 Iowa 286, some important cases on this question, not citing the text.—Ed.)

Cross references. See further in this connection, Graves v. Smith, 13 Am. St. Rep. 60, 5 L. R. A. 298; Walker v. Stenson, 44 Am. St. Rep. 350; Normille v. Gill, 38 Am. St. Rep. 441; Gibson v. Holden, 56 Am. Rep. 146; Hoffman v. Kuhn, 34 Am. Rep. 491; Andrae v. Haseltine, 46 Am. Rep. 635.

MCCORMICK v. BISHOP, 28 IOWA 233

1. Real Estate—Building, the Lower Story of Which is Owned by One and the Second by Another—Right in Equity of Latter to Compel Former to Make Repairs.—Where one party owns the lower story of a building and another party owns the second story thereof,

if the former allows his portion to remain out of repair and thus endangers the premises above, a court of equity will, in a proper case, compel the former to make the repairs, or to allow the latter (owner of the second story) to do so at his (the former's) expense, wholly or in part, as may be determined to be right and just, p. 241.

Partially overruled in Jackson, Trustee, v. Bruns, 129 Iowa 622, 623, 3 L. R. A. (New Series) 510, 106 N. W. 3, holding that when the walls of the owner of the lower story owned by one party have, in the course of Nature, so far decayed that they no longer furnish adequate support to the portion of the building above which is owned by another person, the former should have the right to erect a different structure if he sees fit, and make such use of his premises as he sees fit, regardless of the license which the other may have had to make use of the support of such walls so long as they were sufficient to furnish support.

CECIL v. BEAVER, 28 IOWA 241, 4 AM. REP. 174

1. Parent and Child—Conveyance of Land to Child, and Father Furnishing Purchase Price—Presumption of Advancement—Resulting Trust—Proof Required to Establish.—Where a father purchases and pays for land and causes the conveyance to be made to his child, the presumption arises that it is an advancement, and that no trust results in favor of the father; but this presumption may be overcome by clear and satisfactory evidence that a trust and not an advancement was intended, p. 245.

Reaffirmed in Burkhardt v. Burkhardt, 107 Iowa 374, 77 N. W. 1071.

Reaffirmed and explained in Phillips v. Phillips, 90 Iowa 543, 544, 58 N. W. 879, holding that a voluntary conveyance from a parent to his child is presumed to be an advancement, and the burden of showing that it is not so, is upon the person who claims that it was not so intended.

Reaffirmed and extended in Culp v. Price, and Watkins, 107 Iowa 135, 136, 77 N. W. 849, holding further that a resulting trust in land may be established by parol evidence, but such evidence for such purpose must be clear, decisive and satisfactory, or the legal title will not be disturbed.

Cited in Kramer v. Kramer, 68 Iowa 570 (dissenting opinion), 27 N. W. 759, the majority court holding that where a father buys and pays for land and has the conveyance thereto made to his infant son, and thereafter, in order to borrow money to pay for improvements made thereon, obtains letters of guardianship upon his sworn petition which states that "the said minor has property in his own right, consisting at present wholly of real estate; that a guardian is necessary in order to protect and care for said property," he, the father and guardian, cannot afterward claim a trust in the land.

Cited in Patterson, Gd'n, v. Mills, 69 Iowa 758, 28 N. W. 54, the court holding that an advancement by a parent to a child is a good consideration, and will support a contract or conveyance, except as against other children and against creditors and subsequent purchasers without notice.

Cross references. See further on this question, annotations under Cotton v. Wood (25 Iowa 43), ante. p. 229; Sunderland v. Sunderland (19 Iowa 325), Vol. II, p. 733.

2. Parent and Child—Conveyance by Parent to Child—Recording by Father is a Sufficient Delivery.—Where a father executes a deed to land absolute in form and beneficial in effect to his minor child, and causes the instrument to be recorded, this constitutes a sufficient delivery, and the title passes to the grantee, child. In such case no manual delivery or acceptance by the child is necessary, p. 246.

Reaffirmed in Palmer v. Palmer, 62 Iowa 207, 17 N. W. 464.

Reaffirmed and extended in State v. Engle, 111 Iowa 252, 82 N. W. 763, holding further that when a grantor of land acknowledges the deed and has it recorded with the intention that it pass title to the grantee, the delivery is complete as to the grantor; and that when the grantee thereafter recognizes the land as belonging to him, he thereby assents to or accepts the deed, and the title is complete in such grantee.

Cited in Newton, and Seeley v. Beeler, 41 Iowa 340, the court holding that if a father dies leaving among his papers a deed duly executed in form to one of his children, the law will give it effect, if there is anything indicating that such is the intention of the decedent (grantor); and that this intention is to be determined from the facts and circumstances of the case.

Cited in Hall v. Cardell, 111 Iowa 209, 210, 82 N. W. 505, the court holding that where a father executes and acknowledges a deed to his baby child, and delivers it to the mother, with intention that title pass to the child, this is a sufficient delivery, and the title passes to the child.

Cited in Nowlen v. Nowlen, 122 Iowa 548, 98 N. W. 385, the case turning upon other questions.

Cited in Webb v. Webb, 130 Iowa 462, 104 N. W. 440, the court holding that a delivery to and acceptance of a deed by one of the grantees therein *for the purpose of delivery to all*, and with the knowledge and assent of all, is a sufficient delivery to all.

Distinguished in Davis v. Davis, 92 Iowa 153, 60 N. W. 509, holding that although delivery of a deed may be presumed from the fact that it is executed, acknowledged and filed for record by the grantor, still this presumption may be overcome by proof that no delivery was intended; as the delivery of a deed is always a question of the intention of the parties; and it is not complete until there is an acceptance by the grantee, or until it comes into his possession with the intention

on the part of the grantor, assented to by the grantee, that it shall become operative.

Distinguished in O'Connor v. O'Connor, 100 Iowa 480, 69 N. W. 677, holding that a deed is of no validity unless it is delivered to the grantee; and where, without a previous agreement between the parties therefor, a deed is left by the grantor with the recorder to be recorded, it does not constitute delivery of or acceptance by the grantee, and the grantor may, at any time before such acceptance, order the return of the deed. And in such last case, if it has been recorded, may sue in equity to have the instrument canceled, or declared ineffective.

Distinguished and narrowed in Wadsworth & Co. v. Barlow, 68 Iowa 601, 27 N. W. 776, holding that the mere execution and filing of a deed or other instrument for record, does not constitute acceptance of or delivery to the grantee. Holding, however, that where a person agrees to execute a mortgage on property specifically described in the agreement, and thereafter executes and files the instrument for record, acceptance of the mortgage will be presumed, and it will be valid as against subsequent attachment or judgment creditors of the mortgagor; but this last rule is inapplicable, unless such agreement specifically and accurately names and describes the property on which the mortgage is to be executed. That knowledge of the mortgagee of the execution and filing for record of a mortgage, is not, of itself, an acceptance thereof by him.

Cross references. See further on this question, annotations under Robinson v. Gould (26 Iowa 89), ante. p. 306; Howard v. Foley (8 Iowa 56), Vol. I, p. 492. See, also, in this connection, annotations under Stow, Assignee, v. Miller (16 Iowa 460), Vol. II, p. 456; Day v. Griffith (15 Iowa 104), Vol. II, p. 310.

WILLIAMS v. BROWN, 28 IOWA 247

1. Husband and Wife—Wife's Personal Property in Possession of Husband—When Liable to Satisfy His Debts.—Where a wife permits her personal property to be in the possession of her husband, and fails to file notice of her ownership as provided by Sec. 2502 of the Code of 1860, it is subject to the satisfaction of the debt of her husband, where the credit was given without actual notice on the part of the creditor, of the wife's ownership, pp. 249, 250.

Special cross reference. For cases citing, sustaining and qualifying the text, and others, see annotations under Smith v. Hewitt (13 Iowa 94), Vol. II, p. 123.

Cross reference. See further on this question, annotations under Jones v. Jones (19 Iowa 236), Vol. II, p. 720.

MATHER v. BUTLER COUNTY, 28 IOWA 253

(Later Appeal, 33 Iowa 250.)

1. Contracts—Breach of—Damages Which Could Have Been Prevented by Ordinary Efforts, etc., Not Recoverable—Instructions.—In an action for damages for breach of contract for the defective construction of a building, the plaintiff cannot recover damages which he, at a moderate expense, by ordinary efforts and by the exercise of due diligence, could have prevented. In such case it is the duty of the plaintiff to prevent such damages, and then sue the defendant for the amount expended and value of the labor, etc., in preventing them.

Upon the trial of an action for damages for breach of contract as above, where the evidence justifies it, an instruction embodying the above proposition, is proper, pp. 259, 260.

Reaffirmed in Simpson v. City of Keokuk, 34 Iowa 569; Beymer v. McBride, 37 Iowa 118; Little v. McGuire, 38 Iowa 562, 563; Finch v. Cent. R. R. Co. of Iowa, 42 Iowa 307; Nye, Gourlay & Co. v. Iowa City Alcohol Works, 51 Iowa 131, 33 Am. Rep. 121; Leick v. Fritz, 94 Iowa 326, 62 N. W. 857; Bennett v. Town of Mt. Vernon, 124 Iowa 543, 100 N. W. 351; Kimball Bros. Co. v. Citizens' Gas Electric Co., 141 Iowa 649, 650, 118 N. W. 897, holding the rule equally applicable in actions *ex contractu* and *ex delicto*.

(Note.—See further, Laporte Imp. Co. v. Brock, 99 Iowa 489, 61 Am. St. Rep. 245, 68 N. W. 810; Graves v. Glass, 86 Iowa 261, 53 N. W. 231; Behrens v. McKenzie, 23 Iowa 341, 92 Am. Dec. 428; Adair v. Bogle, 20 Iowa 244; Davis v. Fish, 1 G. Greene, 406, 48 Am. Dec. 387, some important cases sustaining and explaining, but not citing, the text.—Ed.)

EDMONDS v. BANBURY, 28 IOWA 267, 4 AM. REP. 177

1. Elections—Voters—Registration Law, Constitutional, when—Legislative Powers—Constitutional Law.—While the Legislature must leave the constitutional qualifications of voters intact, and cannot add new ones, it may prescribe regulations to determine whether a given person who proposes to vote possesses the required qualifications; and such a law is constitutional when it does not amount to a denial or invasion of the right conferred by the Constitution.

So a statute is Constitutional which requires the registration of voters, and fixes a time and place therefor, provides a board of registry for every township, and for each town or city, and grants every voter an opportunity to vote, p. 272.

Reaffirmed as to first paragraph in Coggeshall v. City of Des Moines, 138 Iowa 737, 738, 117 N. W. 311, 312, holding that Sec. 1131 of the Code of 1897, authorizing women to vote at certain municipal elections and exempting them from registration, is constitutional.

Distinguished in Jones v. Sargent, 145 Iowa 300, 305-308, 124 N. W. 342, 343, holding that the Legislature may prescribe the qualifications to hold municipal offices; and upholding constitutionality of Secs. 679a., 679b., and 679d. of the Code Supplement of 1907.

Unreported citation, 133 N. W. 382.

Cross reference. See further on this question, annotations under Morrison v. Springer (15 Iowa 304), Vol. II, p. 346.

CASE v. ALBEE, 28 IOWA 277

I. Tax Sales of Land—Limitation of Action to Recover Land or Set Aside Sale—When not Applicable—Recitals in Tax Deed not Conclusive, when.—When there has never been any sale of land for taxes, the limitation of five years for the recovery of real estate sold for non-payment of taxes, prescribed by Sec. 790 of the Code of 1860, does not apply. And in such case the recitals in the tax deed are not conclusive as to the fact of sale, pp. 279, 280.

Reaffirmed in Blair Town Lot & Land Co. v. Scott, 44 Iowa 146, 147.

Reaffirmed and explained in Early v. Whittingham, 43 Iowa 167, holding that Sec. 902 of the Code of 1873, corresponding to the section of the text, has no application where there has been neither a levy, assessment or sale of land for taxes; and that in such case the holder of a tax deed acquires no rights or interest whatever.

Reaffirmed and explained in Patton v. Luther, 47 Iowa 237, holding that in order for the bar of Sec. 902 of the Code of 1873, corresponding to the section of the text, to apply, the land must be actually sold for taxes not paid; and that if, at time of sale, the taxes for which land is sold are *in fact* paid, the sale and deed thereunder are void, and such section has no application.

Reaffirmed, explained and qualified in Griffin v. Bruce, 73 Iowa 127, 34 N. W. 774; Waggoner v. Mann, 83 Iowa 21, 48 N. W. 1066, holding that where a tax sale of land is *void*, by reason of there being no levy, assessment, or sale, or where the taxes were paid before the sale, or the land was not subject to taxation, or the like, Sec. 902 of the Code of 1873, corresponding to the section of the text, has no application; but where the sale is *voidable merely* by reason of irregularities and failures to observe the provisions of the statute as to the manner of the levy, assessment, or sale, the sale cannot be questioned after five years from the recording of the tax deed.

Reaffirmed and qualified in Thomas v. Stickle, 32 Iowa 77, 78; Douglass v. Tullock, 34 Iowa 262, 263, holding that the statute mentioned in the text is one of repose, and it was the manifest intention to cure all such irregularities in the *mode or manner* of sale, etc., which, within the five years' limitation might render the sale invalid. Hence holding that the fact that a tax deed shows on its face that several

parcels or tracts of land were sold in bulk and for a gross sum, and is therefore void, cannot be claimed by the land owner after the expiration of five years from the recording of the deed.

Reaffirmed and qualified in Phelps v. Meade, 41 Iowa 472, 473, holding—under Sec. 902 of the Code of 1873, corresponding to the section of the text—that no matter how informal or irregular the sale may have been conducted by the treasurer, if there was a *bona fide* sale in substance or in fact, the tax deed is conclusive evidence that it was done at the proper time and in the proper manner, these being merely directory and not fundamental provisions of the statute: And that a tax deed is conclusive evidence of the due performance and regularity of every step and proceeding in tax sales, as to time and manner of sale, etc.

(Note.—See further, Wilson v. Russell, 73 Iowa 395, 35 N. W. 492; Hillyer v. Farneman, 65 Iowa 227, 21 N. W. 578; Monk v. Corbin, 58 Iowa 503, 10 N. W. 868; Bullis v. Marsh, 56 Iowa 747, 2 N. W. 578; Nichols v. McGlathery, 43 Iowa 189; Pierce v. Weare, 41 Iowa 378, some important cases on this subject, not citing the text.—Ed.)

Cross reference. See further in this connection, annotations under McNamara v. Estes (22 Iowa 246), ante. p. 26; Allen v. Armstrong (16 Iowa 508), Vol. II, p. 465.

2. Estoppel—Tax Deed Holder Bidding at Sale of Land under Execution Against Former Land Owner.—The fact that the holder of a tax deed to land is present and bids at a sale of the land under an execution against the owner of the land at the time it was sold for taxes, does not estop the tax deed holder from setting up such tax title against the execution purchaser, when it is not shown that the latter was not aware of the former's title, or that he was deceived or injured by the conduct of the former, p. 280.

Reaffirmed and varied in Drefahl v. Tuttle, 42 Iowa 181, holding that where an execution creditor becomes a purchaser at a sale thereunder with full knowledge of all facts constituting such sale invalid, and the execution debtor does not accept any of the benefits thereof, the latter is not estopped by any other acts prior thereto and which do not induce the execution creditor to act to his prejudice, from assailing its validity.

IOWA & MINNESOTA R. R. CO. v. PERKINS, 28 IOWA 281

1. Appeal—Exclusion of Evidence Below as Ground for Reversal—Sufficiency of Record to Authorize.—The exclusion of evidence by the trial court will not be ground for reversal, when the record upon appeal does not show the exact nature and character of the evidence which was excluded, p. 284.

Reaffirmed and explained in Jenks v. Knott's Mexican Silver Min. Co., 58 Iowa 552, 12 N. W. 590, holding that in order to determine

whether prejudice resulted to defendant by reason of the exclusion of the evidence, the answers or the facts that they tend to establish, should appear in the record: And that unless prejudice be thus shown by the exclusion, the Supreme Court cannot disturb the judgment for that ground.

Cross reference. See further on this question, note under Rule 3 of *Emerick v. Sloan* (18 Iowa 139), Vol. II, p. 597.

2. United States Revenue Stamp Attached to Written Instrument—Presumption Arising from.—Where a written instrument has a revenue stamp affixed to it (as required by the United States Revenue Law in force in 1869), it will be presumed that it was affixed by the proper person and at the proper time, p. 285.

Reaffirmed in *Un. Agricultural & Stock Ass'n v. Neill*, 31 Iowa 101.

Reaffirmed and extended in *Robinson v. Lair*, 31 Iowa 11, holding further that such presumption is conclusive in favor of an innocent holder, for value, of a promissory note, with a stamp affixed thereto.

Cross reference. See further in this connection, annotations under *Hugus v. Strickler* (19 Iowa 413), Vol. II, p. 743.

3. Railroads—Subscription to Aid in Construction—When Due—When Governed by Terms of Subscription.—When a person subscribes a sum of money to aid in the construction of a certain portion of a railroad, to be payable upon performance of certain conditions by the company, in installments, as the work progresses, not oftener than one in thirty days, the time when the sums become due are governed by the terms of his subscription and not by the articles of incorporation of the company, pp. 287, 288.

Cited in *Peoria & R. I. R. R. Co. v. Preston*, 35 Iowa 121, the court holding that when an Act of incorporation fixes the amount of the capital stock which a corporation may hold, no assessment can be made upon the share of a stockholder, until all the stock is subscribed, unless a contrary intention appears, expressly or by implication, either in the charter or the contract of subscription.

Cited in *Bobzin v. Gould-Balance Valve Co.*, 140 Iowa 749, 118 N. W. 42, holding that any condition which may be legally performed by the corporation may be a condition of a subscription for stock: That a condition subsequent is a valid consideration for a stock subscription; and, while it does not affect the subscriber's liability to take and pay for his stock, it gives him a right of action against the corporation for its failure to perform the condition: Hence holding that where certain citizens of a town subscribe to a certain sum of stock in a corporation upon condition that its principal place of business and office, shop and factory be located in the town for a certain period, the removal thereof from such town during such period, will be enjoined, upon complaint of such stockholders.

Cross reference. See further in this connection, annotations under Des Moines Valley R. R. Co. v. Graff (27 Iowa 99), ante. p. 373.

BURLINGTON GAS LIGHT CO. v. GREENE, THOMAS & CO., 28 IOWA 289
(Former Appeals, 21 Iowa 235; 22 Iowa 508.)

1. New Trial—Appeal from Order Refusing to Grant Because Verdict Against Evidence—Evidence Conflicting—Three Previous Verdicts—Effect—Reversal, when.—Where upon an appeal from an order refusing to grant a new trial because the verdict was against the evidence, it appears that there has been three previous verdicts for the same party, the first one of which was set aside by the trial court and the other two were reversed upon appeal, it will require a very strong case of abuse of judgment on the part of the last jury, and abuse of discretion of the trial court to authorize a reversal for such cause; and if, in such case, the evidence upon the last trial was conflicting, the judgment will be affirmed, p. 290.

Reaffirmed and explained in Slocum, Brenton & Hoopes v. Knosby, 80 Iowa 369, 45 N. W. 877; Gimmelman v. Un. Pac. Ry. Co., 101 Iowa 83, 70 N. W. 93, holding that where there are successive verdicts for the same party, and the district court finally refuses to set aside the verdict because of the insufficiency of the evidence, it requires a strong case of abuse of judgment on the part of the jury to justify the interference of the Supreme Court.

Cited with approval in McMurrin v. Rigby, 87 Iowa 21, 53 N. W. 1080, the court holding that the Supreme Court will not interfere to disturb a verdict when there is sufficient evidence to support it, and where the evidence is conflicting, unless it clearly appears that it is the result of passion or prejudice. The court affirming a judgment upon a third verdict of a jury under this rule.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations and cross references under Rule 2 of Burlington Gas Light Co. v. Green, Thomas & Co. (21 Iowa 335), Vol. II, p. 912.

CONWAY v. YOUNKIN, TREASURER, 28 IOWA 295

1. Taxation and Revenue—Correction of Assessment by Clerk of Board of Supervisors.—Where the assessor, after determining that certain property belongs to a married woman, lists it in the name of her husband, negligently failing to write her name with that of her husband, or to assess it to her alone, the clerk of the board of supervisors may—under Sec. 747 of the Code of 1860—insert the name of the wife with that of her husband on the assessment roll, thus correcting the error in the assessment, pp. 296, 297.

Reaffirmed and explained in Fuller v. Butler, 72 Iowa 731, 32 N.

W. 284, holding that under Sec. 841 of the Code of 1873, the auditor has the power to correct mistakes in an assessment; and that this, necessarily, includes the power to determine when a mistake has been made.

Reaffirmed, explained and qualified in Polk County v. Sherman, 99 Iowa 65, 68 N. W. 563, holding that Sec. 841 of the Code of 1873, authorizes the auditor to insert in the tax list the name of the owner of the property taxed, in lieu of another name erroneously used, and to correct an error in the description of the property, and to list and assess real property wholly omitted from the assessment-book; but that where an assessment has been made and returned to the board of equalization, and the amount is either too high or too low, but is not objected to by the property owner, and is not changed by the board, it cannot be said to be erroneous within the meaning of the section quoted: That the statute has pointed out specifically the method of procedure by which an error in the amount of the assessment may be corrected, and, if that method is not adopted, the assessment is to be taken by the auditor as correct.

Reaffirmed and extended in Adams v. Snow, 63 Iowa 438, 21 N. W. 766, holding further that under Secs. 837, 841, of the Code of 1873, where the assessor lists real estate to a person not the owner, the auditor may, upon transcribing the assessment roll, substitute the true owner's name; that under such section the auditor may insert the name of the true owner of property, in the tax book.

2. Taxes—Injunction to Restrain Collection of—When and When Not Allowed.—Equity will not interpose to prevent the collection of a tax on account of mere irregularities. If the tax, however, is not authorized by law, or is imposed upon property exempt therefrom, or is corruptly or fraudulently assessed, equity will relieve, p. 297.

Reaffirmed in Litchfield v. Hamilton County, 40 Iowa 69; C. R. & M. R. R. Co., and I. R. L. Co. v. Carroll County, 41 Iowa 174; In re Kauffman's Estate, 104 Iowa 641, 74 N. W. 9; Collins v. City of Keokuk, 118 Iowa 34, 91 N. W. 792.

Reaffirmed and qualified in Un. Cent. L. Ins. Co. v. Chapin, 113 Iowa 416-418, 85 N. W. 794, holding that where a partnership exists and its members reside in one county, wherein the members thereof have sufficient property subject to be seized for the payment of personal taxes of the firm, the county treasurer has no authority—under Sec. 1409 of the Code of 1897—to certify the personal taxes to another county, and such certificate is of no effect, and does not bind property of the firm or its members in the latter county, for the payment thereof.

Distinguished in Warfield-Pratt-Howell Co. v. Averill Grocery Co., 119 Iowa 78, 79, 93 N. W. 81, holding that the oath of the assessor required by Sec. 1365 of the Code of 1897, is necessary to a valid Assessment Roll: And that where such oath of the assessor is omitted

therefrom the assessments are invalid, and a tax payer who pays taxes thereunder cannot recover them.

Cross reference. See further on this question, annotations under *Macklott v. City of Davenport* (17 Iowa 379), Vol. II, p. 541.

GOODRICH *v.* CONRAD, ADM'R, 28 IOWA 298

1. **Practice—Nunc Pro Tunc Orders—Power of Court to Make.**—*Nunc pro tunc* orders may be made by a court to supply recitals in the record, or to supply orders and judgments omitted through oversight or negligence of the clerk; but such orders cannot be made to alter or expunge the record, p. 301.

Reaffirmed in *In re Estate of Seavey*, 82 Iowa 441, 48 N. W. 925.

Cross reference. See further on this question, annotations under Rule 3 of *Shephard v. Brenton* (20 Iowa 41), Vol. II, p. 771.

HOFFMAN *v.* STIGERS, 28 IOWA 302

1. **Partition—Judgment in Action of Construed as a Conveyance.**—A judgment in an action of partition settling the rights and particular shares and interests of parties in and to real estate is to be construed as a conveyance, and will be governed by the same rules as ordinary conveyances, p. 304.

Reaffirmed in *Burdick v. Ch. M. & St. P. Ry. Co.*, 87 Iowa 386, 54 N. W. 440.

2. **Joint Tenants and Tenants in Common—Joint Tenancy not Favored—Construction of Conveyances, and Judgment Having Effect of Conveyance—Husband and Wife—Sec. 2214 of the Code of 1860, Construed.**—Under Sec. 2214 of the Code of 1860, a conveyance of land to two or more persons in their own right creates a tenancy in common and not a joint tenancy, unless the instrument expressly and clearly shows the intention to create a joint tenancy. This rule applies to a judgment of partition set out in Rule 1 hereof; and is applicable to conveyances to husband and wife; and to such judgments so settling their rights, shares and interests in land, pp. 307-309.

Reaffirmed in *Bader v. Dyer*, 106 Iowa 719, 68 Am. St. Rep. 332, 77 N. W. 470, the decision being under Sec. 2923 of the Code of 1897, corresponding to the section of the text.

CLARK *v.* CONNOR, 28 IOWA 311

1. **Appeal—General Objection to Evidence Admitted Below, or Record Failing to Show Ground of Objection—Review.**—Where in an action at law the party appealing to the Supreme Court made a general objection, or where the record fails to show the ground of objection, to the admission of evidence, and the objection was overruled, the trial court's ruling will not be reviewed. But where the prevailing or successful party—the appellee—made a general objection

to the admission of evidence which was sustained by the trial court, then if the appellant shows in the Supreme Court that there could be no legal or possible ground upon which the ruling of the court below can be sustained, the appellant will be entitled to a reversal of the judgment, p. 314.

Reaffirmed in Chase, Merritt & Blanchard v. Walters, 28 Iowa 467; Bartlett v. Brown, 29 Iowa 591 (abstract); Engleken v. Webber, 47 Iowa 561.

BAKER v. CORBETT, ADM'R, 28 IOWA 317

1. Vendor and Purchaser of Land—Failure of Title—Rights of Purchaser in Possession—Damages, Measure of.—One in possession of land under a contract whereby the vendor agrees to execute a warranty deed upon the payment of the balance of the purchase price, may purchase an outstanding paramount title thereto, and sue the vendor and recover as damages the amount paid for the paramount title, less the balance of the purchase price; and may, in such action, compel the vendor to execute the warranty deed, pp. 319, 320.

Reaffirmed and explained in Thomas v. Stickle, 32 Iowa 75, 76, holding that one in possession of land under a contract for a warranty deed may voluntarily yield the possession to him who has the better title, or may purchase and hold it; and this is a sufficient ouster or disturbance to sustain an action on the covenant of warranty; but that if he yields possession or buys in an outstanding title he does so at his peril: And if the title to which he yields or which he buys is not good, he must stand the loss; and in either case, in an action against his warrantor, the burden of proof is upon him to show that the title purchased by him, or to which he yielded, was paramount to that of his grantor: But it is otherwise in case of an eviction by force of a judgment at law, with notice of the suit to the warrantor.

Reaffirmed and explained in Richards v. Iowa Homestead Co., 44 Iowa 305, 24 Am. Rep. 745, holding that one holding lands under a deed of warranty may, at his peril, acquire a paramount title in defense of his possession, and in a proper action recover of the grantor in such deed, upon his covenants therein; and that the right of recovery in such a case is limited to the amount of damage actually sustained by the grantee, which is the sum paid for the paramount title, not exceeding the consideration of the deed upon which the action is brought.

Distinguished in Snell v. Iowa Homestead Co., 59 Iowa 703, 704, 13 N. W. 849, holding that until one in possession of land under a warranty deed and who has not been evicted buys in an outstanding paramount title, he cannot sue his vendor upon the warranty and recover other than nominal damages.

Cross references. See further on this question, annotations under Brandt v. Foster (5 Iowa 287), Vol. I, p. 353; Funk v. Creswell (5 Iowa 62), Vol. I, p. 342.

SOBEY v. BEILER, 28 IOWA 323

1. Res Adjudicata—Who Former Judgment Binds—Extent of Binding Effect of.—A judgment on the merits binds and bars a future action concerning the same subject-matter by parties to the first action and their privies, and persons interested in the subject-matter of the first action who have notice of the pendency thereof, and do not come in and assist in prosecuting or defending.

So, where a purchaser of land brings an action for and obtains a judgment for possession thereof against his vendor, and one who claims to be a lessee of the vendor has notice of the pendency of the action and does not defend, the judgment binds all of the above persons, and the one who claims to be lessee cannot, upon éviction, sue the vendor for damages occasioned thereby, p. 325.

Reaffirmed and extended as to first paragraph in Woodin v. Clemmons, 32 Iowa 287, 288, holding further that any one claiming through or under a party to a former action, has the same right to claim the benefit of a former adjudication (in a subsequent action involving the subject-matter) as the original party thereto.

(Note.—There are many other cases sustaining, but not citing the first paragraph of the text.—Ed.)

Cross reference. See further on this question, annotations and cross references under Myers v. Johnson County (14 Iowa 47), Vol. II, p. 203.

LYNCH v. LYNCH, 28 IOWA 326

1. Appeal—Equitable Action Tried Below by Second Method—Review.—Upon an appeal in an equitable action tried below according to the second method prescribed by Secs. 2999 and 3000 of the Code of 1860, the Supreme Court will review the cause as appeals in actions at law; and in such case the decision of the lower court upon the evidence will be treated upon the appeal as the verdict of a jury. And the rule is not changed because, in the absence of agreement, the case was triable in the court below according to the first method prescribed by such sections, pp. 326, 327.

Special cross reference. For cases citing and sustaining the text, and others on this question, see annotations under Snowden v. Snowden (23 Iowa 457), ante. p. 124.

MANNING v. DISTRICT TOWNSHIP OF VAN BUREN, 28 IOWA 332

1. Schools—Purchase of Maps, Charts and Other School Apparatus—Powers of Board of Directors of District Township—Ratification of Unauthorized Contract—What Is Not.—The board of directors of a district township has no authority to make a contract for the purchase of maps, charts or other school apparatus, except when authorized so to do as provided by Sec. 7 of Chap. 172,

Laws of 1862, by a vote of the electors, and a contract made therefor by such board without such authority is void; and an order drawn in payment therefor is void, even in the hands of an innocent holder. The fact of the acceptance and use of the maps, charts or other school apparatus in the schools is not a ratification of such void contract, and does not raise an implied contract on which recovery on *quantum meruit* may be had, p. 336.

Cited with approval in McPherson v. Foster Bros., 43 Iowa 71, 22 Am. Rep. 215, the court holding that power to a municipal corporation to issue bonds or other negotiable paper in payment or as evidence of debt must be expressly conferred, or such bonds or paper issued by it will be void.

Cited with approval in Monticello Bank v. Dist. Township of Coffin's Grove, 51 Iowa 352, 1 N. W. 593, the court holding that the school board of directors of a district township has no power to bind the district by the purchase of lightning rods for school houses, unless as directed by a vote of the district, as allowed by Sec. 1723 of the Code of 1873.

Cited with approval in American Ins. Co. v. District Township of Willow, 55 Iowa 608, 8 N. W. 472, the court holding that the school board of directors of a district township has no power to bind the district by a contract for insurance of a school house, unless it be to carry out a vote of the district as allowed by Sec. 1723 of the Code of 1873.

Special cross reference. For further cases citing and reaffirming, varying, etc., the text, and many others, see annotations under Taylor v. Dist. Township of Wayne (25 Iowa 447), ante. p. 283; and see cross references there found.

PEARSON v. CUMMINGS, 28 IOWA 344

I. Promissory Note Not Indorsed to Holder—Action on.—

The real owner of a promissory note who is in possession thereof, may sue thereon in his own name although it is not indorsed to him, p. 346.

Reaffirmed and explained in Rising v. Teabout, 73 Iowa 420, 35 N. W. 500, holding that the holder of a negotiable or non-negotiable note may—under the Code of 1873—maintain an action thereon in his own name.

Reaffirmed and extended in Cassidy v. Woodward, 77 Iowa 357, 42 N. W. 320, holding further that under Sec. 2544 of the Code of 1873 the party holding the legal title to a cause of action, although he be a mere agent or trustee with no beneficial interest therein, may sue thereon in his own name.

Reaffirmed, extended and varied in Green v. Marble, 37 Iowa 143, holding further that the verbal assignment of a note and guarantee thereof, entitles the assignee to sue on the guaranty in his own name.

Cited with approval in State v. Nine, 105 Iowa 135, 74 N. W. 946, the court holding that an allegation in an indictment for obtaining property by false pretenses, and averring that certain notes were "assigned and transferred," 'does not charge that they were "indorsed."

Cross references. See further on this question, annotations under Rule 3 of Cottle v. Cole (20 Iowa 481), Vol. II, p. 849; Younger v. Martin (18 Iowa 143), Vol. II, p. 598; Rule 2 of Conyngham v. Smith (16 Iowa 471), Vol. II, p. 458.

2. Contracts and Notes—Contracts Between Husband and Wife to Enable Husband to Obtain Divorce Without Legal Ground, Void—Void Note.—A contract between a husband and his wife made for the purpose of enabling the former to obtain a divorce without a legal ground, is void; and a note executed by the husband to the wife in consideration thereof, confers no rights which she can enforce at law against the husband, p. 346.

Cited in Heacock v. Heacock, 108 Iowa 548 (dissenting opinion), 75 Am. St. Rep. 273, 79 N. W. 356, the majority court holding that a note given by a husband to his wife is, under the Code of 1873, unenforceable by her, unless she pleads and proves in her action thereon that it was given as a consideration for or in relation to her separate money or property.

Cross references. See further on this question, annotations under Robertson v. Robertson (25 Iowa 350), ante. p. 277; Jones v. Crosthwaite (17 Iowa 393), Vol. II, p. 546.

HUNT v. ROWLAND, 28 IOWA 349

(Former Appeal, 22 Iowa 54.)

1. Tax Sale of Land which Is Invalid—Cancellation of Tax Deed—Lien of Tax Purchaser for Taxes Paid.—Where the owner of land sold for taxes sues and obtains a cancellation of a tax deed, the grantee or purchaser is entitled to a lien on the land for taxes paid by him in good faith, with interest at six per cent. per annum from the date of payments, p. 350.

Special cross references. For cases citing and sustaining the text, and others, see annotations under Orr v. Travacier (21 Iowa 68), Vol. II, p. 872.

ROBERTS, ASSIGNEE, v. CORBIN & Co., 28 IOWA 355

(Former Appeal, 26 Iowa 315.)

1. Appeal from Judgment on Special Finding of Facts—Reversal—Judgment for Appellant in Supreme Court, or Upon Cause Being Remanded.—Where upon an appeal from a judgment based upon a special finding of facts in an action at law, the Supreme Court finds that the law is with appellant and that he is entitled to

judgment upon the finding, that court may—under Sec. 3536 of the Code of 1860—enter such judgment in that court, or upon the cause being remanded to the district court for proceedings not inconsistent with the opinion, the appellant is entitled to judgment in his favor upon the finding, in the district court, and no new or other trial can be had, p. 357.

Reaffirmed in Gilmore & Smith v. Ferguson & Cassell, 28 Iowa 423; Andrews & Smith v. Burdick & Goble, 64 Iowa 693, 21 N. W. 141; Rew v. Indep. Sch. Dist. of Sioux City, 125 Iowa 39, 106 Am. St. Rep. 282, 98 N. W. 806.

Cited in Wise v. Wilds, 77 Iowa 591, 42 N. W. 554, turning on other points.

Distinguished in Dryden v. Wyllis, 53 Iowa 391, 5 N. W. 519; Baird v. Ch., R. I. & P. Ry. Co., 61 Iowa 367, 368, 13 N. W. 731; Boyce v. Wabash Ry. Co., 63 Iowa 75, 76, 50 Am. Rep. 730, 18 N. W. 676; Meadows v. Hawkeye Ins. Co., 67 Iowa 59, 24 N. W. 592, holding that the rule is inapplicable to reversals in actions at law, except as set out in the text; and that even in that case the special finding of the facts of the trial court or jury, must be complete, and sufficient on which to base the judgment, and it must have been properly entered thereon: That in other cases in actions at law, a new trial may be had below upon reversal and remanding of the cause.

SMITH v. PARKER, 28 IOWA 359

1. Justice's Court—Writ of Error to Correct Error in—Necessity for Motion to Correct Before Issuance of the Writ.—Where an error in a justice's court is capable of being corrected by a motion therefor therein (in this case the entry of a judgment on a defective service of notice) such motion must be made before a writ of error may issue to correct it, p. 360.

Distinguished and narrowed in Holmes v. Hull, 48 Iowa 180, holding that the rule is inapplicable where a judgment is entered in a justice's court having no jurisdiction (in this case for want of service of any notice upon the defendant), and that in such case the defendant must proceed by writ of error, if he has knowledge of the judgment within the time allowed for its issuance, and if not he may proceed by action aided, if necessary, by injunction to have it set aside.

Cross reference. See further on this question, annotations under Leonard v. Hallem (17 Iowa 564), Vol. II, p. 568.

UNITED STATES EXPRESS CO. v. ELLYSON, ASSESSOR, 28 IOWA 370

1. Constitutional Law—Local and Special Legislation—Double Taxation—Tax on Incomes—Chapter 180, Act of 1868, Taxing Express and Telegraph Companies, Constitutional.—Chap. 180 of the Acts of 1868, prescribing the manner of taxing telegraph and express

companies, is not subject to the objection that it provides for "double taxation," taxes incomes, or is local and special legislation, and is constitutional.

A statute providing for the taxation of a particular class of individuals or corporations in a particular manner, and applying to all in a particular class alike, does not constitute local or special legislation, pp. 375-380.

Cited in Layman, County Treasurer, v. Iowa Telephone Co., 123 Iowa 600, 99 N. W. 208, turning on another question.

Special cross references. For cases citing, sustaining and explaining the text, and very many others on the question, see annotations under Rules 1, 4 and 5 of *McAunich v. M. & M. R. R. Co.* (20 Iowa 338), Vol. II, p. 823; *Town of McGregor v. Baylies* (19 Iowa 43), Vol. II, p. 689; *Tallman v. Treasurer of Butler County* (12 Iowa 531), Vol. II, p. 91; *Faxton v. McCosh* (12 Iowa 527), Vol. II, p. 89.

FISHER v. CITY OF OSKALOOSA, 28 IOWA 381

1. Attorney and Client—Lien of Attorney for Fee, Upon Notice to Adverse Party—Payment of Money by Latter to Clerk After Notice—Effect.—Under Sec. 2708 of the Code of 1860, an attorney has a lien for his fee upon money due to his client and in the hands of the adverse party in an action or proceeding in which the attorney was employed, from the time of his giving notice of the lien to that party. After such adverse party is given such notice he cannot defeat the lien by payment to the client or to the clerk of the court in which the action or proceeding was brought.

If, for any reason, as the discharge of the attorney or the like, it cannot be paid to him, it may be paid to the clerk under the condition and direction that it be held subject to the lien of the attorney; but the judgment debtor thus makes the clerk his agent for the proper appropriation of the money, pp. 382-384.

Reaffirmed, explained and qualified in *Ward & Lamb v. Sherbandy*, 96 Iowa 481, 65 N. W. 415, holding that the notice for which the statute (Code of 1873) provides, is effectual to create an attorney's lien only from the time it is served or given, and operates to create a lien on money in the hands of the person who receives it, subject to prior rights thereto.

Reaffirmed and extended in *Hubbard v. Ellithorpe*, 135 Iowa 261, 112 N. W. 797, holding further that an attorney, upon giving the notice prescribed by Sec. 321 of the Code of 1897, corresponding to the section of the text, has a lien upon money awarded to a wife as *permanent* alimony in an action of divorce.

Cross references. See further on this question, annotations under *Hurst v. Sheets & Trussell* (21 Iowa 501), Vol. II, p. 929.

ROBB v. McBRIDE, 28 IOWA 386

1. Homestead—Sale of and Purchase of New Homestead with Purchase Price.—Where a homestead is sold and a new one purchased with its proceeds, the latter has the same homestead character and exemption as the former.

And the fact that the owner of the old homestead is temporarily absent therefrom at the time of the sale with an intention to return, however, does not change this rule, pp. 387, 388.

Reaffirmed in Vittengl v. Vittengl, 135 N. W. 65 (not officially reported).

Reaffirmed and explained in Benham v. Chamberlin & Co., 39 Iowa 359; Cowgell v. Warrington, 66 Iowa 668, 24 N. W. 267, holding that where a second homestead is purchased in part with the proceeds of a previous homestead, together with other funds, the second or new one is exempt from debts contracted by the owner thereof after the occupancy of the old homestead as such, although they be contracted before the acquisition of the new one.

Reaffirmed and extended in Mann v. Corrington, 93 Iowa 111-113, 57 Am. St. Rep. 256, 61 N. W. 410, holding further that the homestead right may exist in vacant land for which a former homestead has been exchanged, or which has been purchased with the proceeds of such a homestead, when the land was thus obtained, and is held in good faith for use as a home: And that the homestead character of land will not be affected by the fact that it cannot be improved and a dwelling house erected thereon, from the proceeds of the former homestead.

Cited in Jones v. Blumenstein, 77 Iowa 65, 66, 42 N. W. 323, the court holding that mere temporary absence from a homestead with an intention to return, does not constitute an abandonment thereof.

Cited in Hostetler v. Eddy, 128 Iowa 405, 104 N. W. 487, the court holding that when land or a dwelling is actually occupied as a homestead, no further evidence of the intention of the owner to claim it as such is required.

Cross references. See further on this question, annotations and cross references under Sargent v. Chubbuck (19 Iowa 37), Vol. II, p. 687. See, also, in this connection, annotations under Fyffe v. Beers, (18 Iowa 4), Vol. II, p. 573; Christy v. Dyer (14 Iowa 438), Vol. II, p. 263.

ALLISON v. HESS, 28 IOWA 388

1. Contract in Violation of Statute or Public Policy, Void—Conveyance Based Upon Agreement to Compound a Felony.—Contracts made in violation of a statute or founded upon an unlawful act, or an act which is contrary to public policy, are void and unenforceable.

This rule applies to a conveyance which is based upon an agreement to compound a felony, pp. 389, 390.

Reaffirmed in Koepke v. Peper, 136 N. W. 903 (not officially reported).

Reaffirmed and extended in Muscatine County v. Carpenter, 33 Iowa 43, holding further that contracts made in violation of law, or founded upon an illegal consideration, or which have for their object anything which is repugnant to the common law, or contrary to the provisions of a statute, are void.

Cross reference. See further on this question, annotations and cross references under Pike v. King (16 Iowa 49), Vol. II, p. 403.

STATE v. HUFFORD, 28 IOWA 391

1. Criminal Law—Fugitives from Justice—Arrest in this State—Form of Charge of Crime Required in State From which Fugitive Fled—Void Bail Bond of Arrested Fugitive.—Before a person who is in this State may be arrested as a fugitive from justice from another state, he must be legally and properly accused of the commission of a crime in the latter state, and the charge must be therein pending before a court or magistrate thereof having jurisdiction. And where a person is so arrested as a fugitive here without the record showing such facts, a bail bond given by him before a justice of the peace hereof is void, pp. 395, 396.

Distinguished in State v. Day, 58 Iowa 679, 680, 12 N. W. 734, the court holding that the courts of this State will not, upon a trial of an indictment upon a plea of not guilty, inquire as to whether or not the defendant was properly or improperly brought within the jurisdiction of the court: That a party cannot claim immunity from an offense charged, upon any such ground.

2. Criminal Law—Courts—Consent Does Not Confer Jurisdiction.—Consent of parties in a criminal case does not confer jurisdiction of the subject-matter upon the court, p. 396.

Distinguished in State v. Westfall and Mathews, 37 Iowa 576, the court holding that where one convicted of a misdemeanor voluntarily pays the fine adjudged against him, he cannot thereafter complain upon appeal.

STATE v. TARR, 28 IOWA 397

1. Rape—Proof Required.—Upon the trial of an indictment for rape the State is not required to prove *by the alleged injured female* the facts of non-consent, resistance or force and actual penetration; but the jury are to determine from all the facts and circumstances proven, whether the crime is made out beyond a reasonable doubt and a conviction is warranted, p. 401.

Reaffirmed in State v. Carnagy, 106 Iowa 485, 76 N. W. 805.

(Note.—There are other cases sustaining but not citing the text.—Ed.)

2. Rape—Want of Consent—Evidence—Imbecility of Injured Female.—The mere submission of an imbecile female in the power of a strong man, is not such consent as will constitute a defense to the crime of rape, pp. 406, 407.

Cited in State v. McDonough, 104 Iowa 12, 73 N. W. 358, the court holding that upon the trial of an indictment for rape, evidence of the mental capacity of the alleged injured female, is admissible as bearing upon the question of consent.

Cited in State v. Snyder, 119 Iowa 19, 91 N. W. 763, turning on other points.

Cross reference. See further on this question, annotations under Rules 4-6 of State v. Cross (12 Iowa 66), Vol. II, p. 12.

BERRY v. BOYD, 28 IOWA 410

1. Notes and Mortgages—United States Revenue Stamp—Second Mortgage to Secure Same Debt.—While under the Act of Congress of the Thirty-eighth Session (1863-64) one stamp affixed to a mortgage is sufficient for both it and the note thereby secured, yet if, after the execution of the first, a second mortgage be given on other property to secure the same debt, a stamp must, also, be affixed to the latter, or it will be invalid, p. 412.

Cited in Wilson v. Reuter, 29 Iowa 181, turning on another point.

Cross reference. See further on this question, annotations under McBride v. Doty (23 Iowa 122), ante. p. 87.

EVERETT v. CEDAR RAPIDS & M. R. R. CO., 28 IOWA 417

1. Certiorari—What Writ to be Heard on.—A writ of *Certiorari* is to be heard upon the writ and return, and the court will look *alone* to these for irregularity and illegality in the proceeding sought to be annulled, p. 418.

Reaffirmed in Jordan v. Hayne, 36 Iowa 15.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 3 of McCollister v. Shuey (24 Iowa 362), ante. p. 198.

GILMORE & SMITH v. FERGUSON & CASSELL, 28 IOWA 422

1. Appeal from Judgment upon Special Finding of Facts by Court or Jury—Judgment in Supreme Court.—Upon an appeal from a judgment based upon a special finding of facts by the trial court or

a jury, when the Supreme Court decides that appellant was, upon such finding and as a matter of law, entitled to judgment, it may—under Sec. 3536 of the Code of 1860—enter such judgment in the Supreme Court as should have been entered below, p. 423.

Reaffirmed in Cobb, Blasdel & Co. v. I. C. R. R. Co., 38 Iowa 633; *In re* Bresee, 82 Iowa 580, 48 N. W. 993.

Special cross reference. For further cases citing and sustaining the text, and others on the question, and distinguishing it, see annotations under Roberts, Assignee, v. Corbin & Co. (28 Iowa 355), ante, p. 461.

HUNT v. POSTLEWAIT, 28 IOWA 427

1. Principal and Surety—Extension of Time to Principal to Pay Without Consent of Surety—Release of Surety, When—Forbearance to Sue.—A valid agreement based upon a new and sufficient consideration made between the creditor and principal without the knowledge or consent of the surety, whereby the creditor binds himself to not sue for a definite period after the maturity of the debt, releases the surety: But a mere forbearance or agreement not to sue on the debt on the part of the creditor and not based upon a new and valuable consideration is not binding, and does not release the surety, pp. 430, 431.

Reaffirmed in Davis v. Graham, 29 Iowa 518, 519; Hensler v. Watts, 113 Iowa 742, 84 N. W. 667; Runkle & Fause v. Kettering, 127 Iowa 8, 102 N. W. 143.

Cited in Lahn v. Koep, 139 Iowa 351, 115 N. W. 903, the court holding that an oral promise to extend the time of payment of a promissory note is binding, if based upon a sufficient consideration; and that when the maker of a note verbally agrees with the payee or creditor to not pay the note until a definite period after its maturity and to pay interest during such period, the agreement is based upon a sufficient consideration, and is binding on the parties.

Unreported citation, 115 N. W. 877.

Cross references. See further on this question, annotations and note under Rule 3 of State ex rel. Clark et al. v. City of Davenport (12 Iowa 335), Vol. II, p. 56; Rule 1 of Kelly v. Gillespie (12 Iowa 55), Vol. II, p. 9.

PARSONS v. CAREY, 28 IOWA 431

1. Limitation of Actions—Part Payment Insufficient to Prevent Bar—New Promise Must Be in Writing.—Under Sec. 2751 of the Code of 1860, part payment is insufficient to prevent a debt being barred by the statute of limitation; and a new promise must be in writing, signed by the party to be thereby charged, in order to have this effect, pp. 433, 436.

Reaffirmed in Harrencourt v. Merritt & Bro., 29 Iowa 72; Roberts v. Hammon, 29 Iowa 129.

Reaffirmed and explained in Hale v. Wilson, 70 Iowa 312, 313, 30 N. W. 740, holding that in order to prevent the bar of the statute of limitation, under Sec. 2539 of the Code of 1873, corresponding to the section of the text, there must be a writing signed by the party to be charged and containing a direct admission that the debt is due, or a new promise to pay it.

Reaffirmed and varied in Kleis v. McGrath, 127 Iowa 461, 463, 465, 109 Am. St. Rep. 396, 69 L. R. A. 260, 103 N. W. 372, 373, holding that in order for a debt to be revived after it is barred by the statute of limitation, the acknowledgment of the debt or new promise to pay it as allowed by Sec. 3456 of the Code of 1897, must be in writing, signed by the debtor or party to be charged, and be clear, explicit and unequivocal.

Distinguished in First Nat'l Bank of Sigourney v. Woodman, Ex'x, 93 Iowa 672, 673, 57 Am. St. Rep. 287, 62 N. W. 29, holding that where a debtor promises to pay his creditor by letter, but the letter is insufficient to identify the debt, parol evidence is admissible for this last purpose, and to make the new promise sufficient in this respect to prevent the bar of the statute of limitation.

2. Statute of Limitations—Application of Sec. 2751 of Code of 1860 to Debts Existing at Time it Was Passed—Constitutional Law.—The fact that Sec. 2753 of the Code of 1860 makes Sec. 2751 thereof and Rule 1 hereof applicable to debts existing and not barred at the time of its taking effect, does not render the latter section unconstitutional as impairing the obligation of contracts, p. 436.

Reaffirmed in Harrencourt v. Merritt & Bro., 29 Iowa 72; Roberts v. Hammon, 29 Iowa 129.

Cited in Allerton v. Manona County, 111 Iowa 561, 82 N. W. 922, the court holding that the legislature may constitutionally pass laws in relation to the remedy, evidence and procedure, and make them applicable to existing contracts, rights and causes of action—the court upholding the constitutionality of Sec. 1947 of the Code of 1897.

Cited in Rauen, Adm'r. v. Prudential Ins. Co., 129 Iowa 730, 106 N. W. 200, the case turning on another question.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

MAHASKA COUNTY R. R. CO. v. DES MOINES VALLEY R. R. CO.,
28 IOWA 437

1. Private Corporations—Railroad Companies—Power of Directors to Sell and Transfer Part of Uncompleted Road-bed.—The board of directors of a railroad company may, when authorized by the charter and articles of incorporation thereof and pursuant

to the power thereby conferred, sell and transfer part of the uncompleted road-bed of the company to another company, together with all rights and privileges connected therewith, p. 451.

Special cross reference. For cases citing and explaining the text, and others, see annotations under Rules 2-5 of Buell v. Buckingham & Co. (16 Iowa 284), Vol. II, p. 437.

Cross reference. See further on this question, annotations under Rule 2 of Dunham v. Isett (15 Iowa 284), Vol. II, p. 344.

2. Estoppel in Pais.—Neither a private individual, a corporation, municipal or private, or the members of a corporation can stand by with full knowledge of all the facts and allow a purchaser of property to, in good faith, expend money or make valuable improvements on real estate, and thereafter attack the validity of his title, p. 454.

Reaffirmed in Peters v. Jones, 35 Iowa 517, 518; Bullis v. Noble, 36 Iowa 620, 621; B. C. R. & M. R. R. Co. v. Stewart, 39 Iowa 270, 271.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

WOLCOTT v. TIMBERMAN, 28 IOWA 454

1. Non-negotiable Notes and Choses in Action—Assignment of "Without Recourse"—Effect.—The assignment of a non-negotiable promissory note or other chose in action "without recourse" relieves the assignor of liability as vendor, and for failure of title, pp. 458, 459.

Special cross reference. For cases citing and explaining the text, and others, see annotations under Rule I of Watson v. Cheshire (18 Iowa 202), Vol. II, p. 612.

CHASE, MERRITT & BLANCHARD v. WALTERS, 28 IOWA 460

1. Insolvent Debtor—Conveyance or Mortgage to One Creditor Hindering, Delaying or Defeating Others—When not Fraudulent.—An insolvent debtor may, even with a fraudulent intent to hinder, delay or defeat other *bona fide* creditors mortgage his property to secure a *bona fide* creditor; and it will not be set aside as fraudulent, even though the mortgagee (*bona fide* creditor secured) knew of the fraudulent intent of the mortgagor (debtor) at the time of its execution.

To accept a mortgage from a debtor who executes it with the intent, known to the mortgagee (secured creditor), to delay or defraud another creditor or other creditors will not render the instrument void or fraudulent, if the creditor accepted it to secure a *bona fide* debt due to him from the mortgagor (debtor), p. 469.

Reaffirmed in Kohn Bros. v. Clement, Morton & Co., 58 Iowa 592, 12 N. W. 552; Aultman, Miller & Co. v. Heiney, 59 Iowa 657,

13 N. W. 858; Rockford Boot & Shoe Mfg. Co. v. Mastin, 75 Iowa 115, 39 N. W. 221; Stroff v. Swafford Bros., 81 Iowa 699, 47 N. W. 1024.

Reaffirmed and explained in Crouse v. Morse, 49 Iowa 385, holding that the rule is equally applicable where a husband secures his wife who is his *bona fide* creditor.

Reaffirmed, explained and qualified in Rosenheim v. Flanders, 114 Iowa 293, 86 N. W. 294; Richards v. Schreiber, 98 Iowa 428, 67 N. W. 571, holding that a creditor acting in good faith may take security from his debtor, even though he knows there are other creditors, and that the effect of the debtor's action will be to defeat them: But the creditor must act in good faith, for, if he takes the conveyance for the purpose of aiding in the fraud, it will be fraudulent as to unsecured creditors.

Cited in Neuffer v. Moehn, 96 Iowa 733 (abstract), 65 N. W. 335, involving another question of a fraudulent conveyance.

Distinguished in Baudinot, Trustee, v. Hamann, 117 Iowa 24, 25, 90 N. W. 498, holding that under Sec. 60b, of the United States Bankrupt Act of 1898, a trustee in bankruptcy may, by action in equity, set aside a conveyance made by a bankrupt to a creditor, when the latter has reasonable cause to believe that a preference was intended, and when it was made within four months before or after the filing of the petition in bankruptcy.

Unreported citation, 91 N. W. 594.

Cross reference. See further on this question, annotations under Lampson & Powers v. Arnold (19 Iowa 479), Vol. II, p. 751.

DUNLAP v. PULLEY, 28 IOWA 469

1. County Roads—Compensation to Land Owner—Duty of Land Owner to Claim Damages—Compliance with Statute.—If, in a proceeding for the establishment of a county road, the owner of the land taken does not claim damages, and otherwise enforce his claim therefor as allowed by law, it may be taken without compensation to him, pp. 471, 472.

Reaffirmed in Abbott v. Board of Supervisors of Scott County, 26 Iowa 356.

Reaffirmed in Costello v. Burke, 63 Iowa 363, 364, 19 N. W. 248, holding, also, that when the owner of an interest in land sought to be taken for a highway claims damages in the proceeding therefor, the damages are to be assessed as to the interest or title of the claimant therein; and that the burden is on him to prove the nature of his interest or title.

BARNEY v. MYERS, 28 IOWA, 472.

1. Mortgage or Incumbered Real Estate—Subsequent Sale and Conveyance in Separate Parcels to Several Distinct Purchasers and Grantees—Contribution.—Mortgaged or incumbered real prop-

erty, conveyed subsequently in parcels to different grantees, must contribute proportionately to the discharge of the incumbrance, and not in the inverse order of alienation, p. 478.

Reaffirmed in Tufts v. Stanley, 42 Iowa 630; Dilger v. Palmer, 60 Iowa 128, 10 N. W. 768.

Reaffirmed, explained and qualified in Windsor & Cathcart v. Evans, 72 Iowa 693, 694, 34 N. W. 481, holding that when mortgaged lands are sold in several tracts, each must contribute ratably to the satisfaction of the mortgage debt; but, if a part of the land be not conveyed such part should be first sold under the mortgage, or offered for sale, before the other part is offered for sale.

Reaffirmed and extended in Witt v. Rice, 90 Iowa 656, 57 N. W. 951, holding further that when mortgaged property is alienated it must bear its share of the mortgage debt *pro rata* according to its value, and without regard to improvements subsequently placed thereon.

Cross references. See further on this question, annotations under Rule 2 of Griffith, Adm'r, v. Lovell (26 Iowa 226), ante. p. 319; Rule 1 of Massie v. Wilson (16 Iowa 390), Vol. II, p. 447.

McINTIRE v. McCONN, 28 IOWA 480

1. **Wills—Undue Influence, When Sufficient and When Not Sufficient to Set Aside Will.**—In order that a will be set aside for undue influence, the influence exerted or exercised over the testator must be to the extent of destroying, in some degree, his free agency. The fact that a bequest was made upon request, or even persuasion, of the legatee is not *alone* sufficient to establish undue influence such as the law contemplates, p. 486.

Reaffirmed and explained in Denning v. Butcher, 91 Iowa 438, 59 N. W. 73, holding that the presumption of law is that the testator was of sound mind and disposing memory when he executed his will, that it was his own voluntary act, free from the dictation and procurement of others, which presumption obtains until overcome by proper testimony: That the mere fact that the testator gave a legacy to one not of his blood, and who had been his confidential business agent, will not cast upon such legatee the burden of showing that the will was not made by his influence or procurement; and that this would be true even if such bequest should be held to indicate that the will, in view of all the circumstances, was unreasonable in its provisions.

Reaffirmed and explained in Mallow v. Walker, 115 Iowa 242, 243, 91 Am. St. Rep. 158, 88 N. W. 454, holding that the burden of proof is on the party seeking to establish the fact of undue influence for the purpose of having a conveyance or will set aside, and the evidence must show that the influence was such as to overcome the

will of the grantor, and to destroy, to some extent, at least, his free agency; and it must appear that the undue influence was exercised at the time the act referred to was done; and that the fact that the act was done by reason of the influence resulting from affection or attachment, or a mere desire to gratify the wishes of another, if the free agency of the party is not impaired, does not affect the validity of the act: And that even if it appears that a deed or will is executed at the suggestion or request of the grantee or devisee, and is prompted by the influence which such person has acquired by business confidence, or the showing of an affectionate regard, this will not prove undue influence, unless the freedom of the will has been in some way impaired or destroyed.

Reaffirmed and explained in Perkins v. Perkins, 116 Iowa 262, 263, 90 N. W. 58, holding that even though it may be clearly shown in a will contest that a wife requested her husband to make the will in her favor and that he would not have so done but for her importunities, this is insufficient to set aside the will for undue influence: That to be undue within the meaning of the law, the influence must be such as subjects the will of the testator to that of the person exercising it, and makes the paper express the purpose of such person rather than that of the testator; or in other words it must be equivalent to moral coercion; and such undue influence must be directly connected with the execution of the will and operating at the time it is made.—And to the same effect is Henderson v. Jackson, 138 Iowa 332, 111 N. W. 823, reaffirming the text.

Cited in Goldtharp v. Goldtharp, 115 Iowa 436, 88 N. W. 946, the court holding that when the attesting witnesses are offered to prove the will, and it seems to be executed in due form, this alone is generally sufficient where objections are made to the probate thereof; and that the burden of proving want of mental capacity and undue influence is upon the contestant, and, as a general rule, the burden never shifts.

(Note.—See further, Chambers v. Brady, 100 Iowa 622, 69 N. W. 1015; Blake v. Rourke, 74 Iowa 520, 38 N. W. 392; Muir v. Miller, 72 Iowa 585, 34 N. W. 429; Smith v. James, 72 Iowa 516, 34 N. W. 309; Stephenson v. Stephenson, 62 Iowa 166, 17 N. W. 456; Webber v. Sullivan, 58 Iowa, 260, 12 N. W. 319, some important cases in this connection, not citing the text.—Ed.)

Cross references. See further on this question, annotations under Bates v. Bates (27 Iowa 110), ante. p. 374. See, also, in this connection, Gilbert v. Gilbert, 58 Am. Dec. 268; In re Shell's Estate, 89 Am. St. Rep. 181, 53 L. R. A. 387; Englert v. Englert, 82 Am. St. Rep. 808; In re Kaufman's Will, 59 Am. St. Rep. 179; Thompson v. Ish, 17 Am. St. Rep. 552; Aulmon v. Pigg, 25 Am. Rep. 303.

MARSHALL v. RUDDICK, 28 Iowa 487

(Former Appeal, 23 Iowa 243.)

1. Mortgagees of Land—Junior Who Tenders to Senior Proper Amount Before Foreclosure Sale, Subrogated to Rights of Latter.—If a junior mortgagee of land tenders to the senior his debt, interest and costs before foreclosure sale therefor, he (the junior) is subrogated to the rights of the latter (senior), although the money be not accepted, pp. 488, 489.

Cited in Shimer v. Hammond, 51 Iowa 405, 1 N. W. 659, the court holding that a junior mortgagee who pays or satisfies a senior mortgage on real estate, and takes an assignment thereof, has the same rights as the senior; and that when a junior mortgagee of land pays or satisfies the senior's decree of foreclosure and takes an assignment thereof, he has the same right to have the land sold thereunder as had the senior.

2. Homestead—Sale of and Purchase of New Homestead with Purchase Price.—Where a homestead is sold and a new one purchased with its proceeds, the latter has the same homestead character and exemption as the former, p. 490.

Special cross reference. For cases citing, sustaining, etc., the text, and many others, see annotations under Rule 2 of Pearson v. Minturn (18 Iowa 36), Vol. II, p. 579.

3. Homestead—Possession Under Tax Title—Buying in Outstanding Titles.—Where possession of land is taken and held by the holder of a tax title under a good faith claim of title thereunder, and it is so occupied as a home, the homestead attaches from the time of such taking of possession and occupation; and the fact that he thereafter bought in outstanding titles or liens to or on the land, does not change the rule, pp. 490, 491.

Cited in Hamilton v. Wright, 30 Iowa 483, the court holding that a tax title is sufficient color of title on which to base a claim of adverse possession of land; and that the fact that a person so holding possession obtains another deed or title does not change the rule or defeat his rights.

HINMAN v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co., 28 Iowa 491

1. Railroads—Liability for Killing or Injuring Stock—"Running at Large" Defined.—A railroad company is liable under Sec. 6 of Chap. 169 of the Acts of 1862 for killing or injuring stock at a place where it has a right to but does not fence its track, or where, having once erected a fence at such place, it negligently fails to maintain, or keep in repair a sufficient fence. And where stock escapes from its owner's inclosure and stray upon the track at such a place and is killed or injured by the company's train, it is liable therefor under such section.

The words "running at large" as used in the section above named, import that the stock is not under the control of the owner; that it is not confined by inclosures to a certain field or place, nor under the immediate care of a shepherd or herdsman; that it is left to roam wherever it may go, pp. 493-495.

Reaffirmed in Swift v. North Mo. R. R. Co., 29 Iowa 244; Tredway v. S. C. & St. P. R. R. Co., 43 Iowa 529.

Reaffirmed as to second paragraph in Valleau v. Ch., M. & St. P. Ry. Co., 73 Iowa 724, 725, 36 N. W. 760.

Reaffirmed and explained in Smith v. Ch., R. I. & P. R. R. Co., 34 Iowa 97-99, holding that under Sec. 6, Chap. 169, Acts of 1862, a railroad company is not liable absolutely for killing or injuring stock by its train at a place where it has a right to but has not fenced, when such stock is under the control of the owner; and that in order to constitute such liability, such stock, when so killed or injured must be running at large.

Reaffirmed and explained in Hammond v. C. & N. W. R. R. Co., 43 Iowa 171, holding that when an animal escapes from the control of a man and gets upon a railroad company's track through a gate blown open by the wind, by reason of the railroad company failing to provide a sufficient fastening therefor, and is killed, the company is liable therefor under the law of the text.

Reaffirmed, explained and extended in Clary v. Iowa Midland R. R. Co., 37 Iowa 348, 349, holding that under the law of the text, it is lawful and railroad companies have the right to fence their road, and their absolute liability attaches for stock killed or injured at any point on the line of their road where it is not fenced, except at crossings of streets and highways and on depot grounds: And holding further that under Sec. 1, Chap. 79, Acts of 1868, a railroad company running and operating its cars under a lease, is absolutely liable to the same extent for stock killed or injured by its trains at points on the road where it was lawful to fence and where no fences had been erected, as if it owned the road; and it cannot relieve itself of this liability by a private contract with the lessor of the road.

Reaffirmed and varied as to second paragraph in Miracle Stone Co. v. Roth, 144 Iowa 657, 658, 123 N. W. 346, holding that cattle kept within an inclosure by the owner are not "running at large," and cannot be distrained by a person who owns or occupies part of the field.

Reaffirmed and varied as to second paragraph in Conway v. Jordan, 110 Iowa 466, 81 N. W. 704, holding that when the owner of a bull turns him into a pasture that is improperly fenced and that will not restrain him, and he escapes therefrom into an adjoining field, he is "running at large," although the fault in the fence may be due to the negligence of a person who distrains him, as allowed by Sec. 2250 of McClain's Code, or Sec. 2312 of the Code of 1897.

Reaffirmed and narrowed as to second paragraph in Grove v. B. C. R. & N. Ry. Co., 75 Iowa 164, 39 N. W. 249, holding that when two horses are being driven by a man in a wagon they are not "running at large," and a railroad company is not liable for killing them, although the driver was too intoxicated to drive them, and was, in fact, asleep at the time they were struck and killed.

Distinguished in Stephens v. D. & St. P. R. R. Co., 36 Iowa 328-330, holding that under the law of the text, and Chap. 79, Acts of 1868, a railroad company which has constructed and is actually operating a railroad is not liable for the killing or injuring stock at a place where it has a right to but does not fence, by another company which is also using the road; but that in such case each company is liable severally for the killing or injuring stock by them.

Cross references. See further on this question, annotations under Stewart v. Ch. & N. W. R. R. Co. (27 Iowa 282), ante. p. 404; Davis v. B. & M. Riv. R. R. Co. (26 Iowa 549), ante. p. 361; Spence v. Ch. & N. W. R. R. Co. (25 Iowa 139), ante. p. 248; Fernow v. D. & S. W. R. R. Co. (22 Iowa 528), ante. p. 66; Russell v. Hanley (20 Iowa 219), Vol. II, p. 804.

SEARS v. SELLEW, 28 IOWA 501

1. Actions—Practice—Referee—Affidavit of for Faithful Performance of Duties—Lost Affidavit, Sufficiency of Proof of.—Where the affidavit of a referee for the faithful performance of his duties required by Sec. 3100 of the Code of 1860, is lost, the affidavit of the referee that he made it, and of the notary before whom it was sworn to that it was made, before the referee entered upon his duties is sufficient to establish the fact and to comply with the section, and the report will not be set aside under such facts, p. 504.

Cited in Ogden v. Forney, 33 Iowa 207, the court holding that it is reversible error for the lower court to set aside an award of arbitrators because they did not sign the affidavit for the faithful performance of their duties before they entered thereon, when affidavits of the arbitrators and of the justice of the peace who swore them shows that they were regularly sworn before they entered upon the discharge of their duties, and that it was agreed *between the parties* that the affidavit be made and signed later.

2. Lands—Tenants in Common—Liability of for Rents—Disseizin of Co-tenant—Effect.—Where one tenant in common holds possession of land adversely to another one, or disseizes or ousts the latter of possession, the former is liable to the latter for his share of the value of the yearly rents and profits: And this is the rule although the former derives no rents or profits from the lands, pp. 506, 507.

Reaffirmed in Austin v. Barrett, 44 Iowa 491; Rippe v. Badger, 125 Iowa 729, 106 Am. St. Rep. 336, 101 N. W. 642.

Reaffirmed in Dodge v. Davis, 85 Iowa 82, holding that a tenant in common whose interest is held adversely by another one, or who has been ousted by the latter, may sue the latter for his share of the rents and profits, and for trees cut and carried away by the latter (or co-tenant in possession).

Reaffirmed and explained in Varnum v. Leek, 65 Iowa 752, 753, 23 N. W. 152, holding—as does the present case in argument—that it is the right of a tenant in common to occupy the common property, and such occupancy alone does not render him liable for rent; and that such mere occupancy does not, of itself, entitle another tenant in common to a receiver: Unless the former is liable to account for the latter's share of the rents and profits, and is at the same time, insolvent or financially irresponsible.

Reaffirmed and explained in Van Ormer v. Harley, 102 Iowa 159, 71 N. W. 244, holding that the general rule in regard to the liability of a tenant in common to a co-tenant for the rent of the property which is the subject of their co-tenancy, in the absence of agreement, is that if one actually occupies the property, but his occupation is not adverse and he does not exclude therefrom his co-tenant, he is not liable for rent, although his co-tenant does not share in the use of the premises: But that when there is an ouster, and a tenant in common occupies and uses the property adversely to his co-tenant, or where he leases it to a third person, he is liable to his co-tenant for rent.

Cited in Dodge v. Davis, 85 Iowa 80, 52 N. W. 3, the court holding that where one has the right of property in real estate and also the right of immediate possession, he may maintain trespass, although the actual possession is in another.

Unreported citation, 17 N. W. 660.

(Note.—See further on this question, Leach v. Hall, 95 Iowa 611, 64 N. W. 793; Belknap v. Belknap, 77 Iowa 71, 41 N. W. 568; Reynolds v. Wilmeth, 45 Iowa 693; Burns v. Byrne, 45 Iowa 285, some important cases on this question, not citing the text.—Ed.)

Cross references. See Rule 3 hereof, in this connection.

3. Lands—Tenants in Common—One Paying Incumbrance—Contribution.—One tenant in common, who has removed an incumbrance from the joint estate, may compel his co-tenant by an action at law to contribute his just proportion of the expenses thus incurred, p. 508.

Reaffirmed in Oliver v. Montgomery, 42 Iowa 37, 38; Weare v. Van Meter, 42 Iowa 130, 20 Am. Rep. 616; Moy v. Moy, 89 Iowa 512, 56 N. W. 669; Koboliska v. Swehla, 107 Iowa 127, 77 N. W. 577.

Reaffirmed, explained and extended in Rippe v. Badger, 125 Iowa 726, 727, 106 Am. St. Rep. 336, 101 N. W. 643, holding that co-tenants are liable for the purchase price of the common property, and for the liens and incumbrances against it, in proportion to their respective interests; and if one co-tenant pays off the lien, or pays more than his

share thereof, or if he pays more than his share of the purchase price, he is entitled to contribution from his co-tenant for his proportion, and has a lien upon the property to secure the payment thereof.

LEASE, *v.* VANCE, 28 IOWA 509

1. **Fences—Division Fences—Rights, Remedies and Procedure Governed Strictly by Statute.**—Chap. 61 of the Code of 1860, in the absence of prescription or agreement, creates the obligation and prescribes the method of settling all controversies as to division fences, which is by applying to the fence viewers, and that method must be pursued, p. 511, 512.

Reaffirmed in Farmer *v.* Young, 86 Iowa 384, 385, 53 N. W. 280.

Cited in Hodges *v.* Tama County, 91 Iowa 581, 60 N. W. 186, the court holding that Chap. 70, Acts of 1884, as amended by Chap. 42, Acts of 1888, in reference to the payment of owners of sheep injured or killed by dogs, and the manner of ascertainment and collection of claims therefor, is *exclusive* and must be pursued.

Cross reference. See further in this connection, annotations under Cole *v.* City of Muscatine (14 Iowa 296), Vol. II, p. 240.

STATE *v.* ROBINSON, 28 IOWA 514

1. **Highway—Obstruction of—Criminal Prosecution for—Evidence of the Establishment of.**—Upon the trial of a person accused of obstructing a highway, the State may prove the establishment thereof, either by documentary evidence or by the facts of consent of the land owner, and continued user by the public for the statutory period of ten years, p. 514.

Special cross reference. For cases citing and reaffirming the text, and other, see annotations under State *v.* Snyder (25 Iowa 208), ante. p. 257.

HIGLEY & Co. *v.* NEWELL, 28 IOWA 516

1. **Trial—Sealed Verdict—When Jury May Retire and Correct.**—Where there is no issue as to *the amount* of the claim of a party (plaintiff or defendant) for whom a verdict is returned, but only an issue as to his right to recover at all, and the verdict as returned does not state the *amount*, the jury may retire and correct it. And this may be done upon the opening and reading of a sealed verdict, pp. 518, 519.

Special cross reference. For cases citing, reaffirming and explaining, etc., the text, and many others on the question, see annotations under Lee & Co. *v.* Bradway (25 Iowa 216), ante. p. 258; and see, also, cross reference there found.

STATE v. BOYLE, 28 IOWA 522

1. Homicide—Indictment Charging Murder in Second Degree—Trial for First Degree, Reversible Error.—Where an indictment charges only murder in the second degree, it is reversible error to put accused upon trial for murder in the first degree thereunder, although he may be only convicted upon the trial of murder in the second degree, pp. 525, 526.

Reaffirmed in State v. Knouse, 28 Iowa 119, 120; State v. McNally, 32 Iowa, 581, 582.

Reaffirmed and extended in State v. Andrews, 84 Iowa 91, 92, 50 N. W. 550, holding further that in a homicide case, it is reversible error to put accused upon trial for an offense of a higher degree than that with which he is charged, even though the indictment sufficiently charges the offense of which the jury convict him.

Cited in State v. Kyne, 86 Iowa 618, 53 N. W. 420, the court holding that where upon the trial of an indictment for rape there is no evidence that accused committed the crime, it is reversible error for the court to instruct the jury thereon, even though the jury only convict accused of the lesser degree of an assault with an intent to commit rape.

Cited in State v. Adams, 78 Iowa 298, 43 N. W. 196, not in point.

Distinguished in State v. Baker, 143 Iowa 230, 121 N. W. 1030, the court holding that upon a trial for murder in the first degree (the crime being sufficiently charged), it is the duty of the court to instruct the jury as to the several degrees, where there is any evidence to support the instructions.

Cross references. See Rule 2 hereof, in this connection. See further on this question, annotations under State v. Tweedy (11 Iowa 350), Vol. I, p. 824.

2. Murder—First Degree—Indictment for—Averments that it Was "Willful, etc."—When Required—Murder in Second Degree.—Under Sec. 4192 of the Code of 1860, an indictment for murder in the first degree where the deceased was not killed by means of poison, or by accused lying in wait, or in the perpetration or attempt to perpetrate arson, rape, robbery, mayhem, or burglary, must charge that the killing was done with malice aforethought and willfully, deliberately and premeditately: that is the indictment must allege an intent to kill by accused, and that the killing was so done, and with malice aforethought, willfully, deliberately and premeditately; but if such indictment fails to so aver when these averments are so required, it is good as an indictment for murder in the second degree, pp. 524, 525.

Special cross reference. For cases citing and reaffirming the text, and many others, see annotations under State v. McCormick (27 Iowa 402), ante, p. 416; and see cross references there found.

CASE & CO. v. LUSE, 28 IOWA 527

1. Contracts—Guaranty of Credit—Necessity of Acceptance by Person Extending Credit, and Notice Thereof to Guarantor.—Where a person, by writing, proposes to guarantee the credit of another to a third person dealing with the latter, the person dealing upon the strength of the guaranty and extending the credit on the faith thereof, must notify the guarantor of the acceptance of his guaranty, in order to bind him, p. 529.

Reaffirmed and explained in German Sav. Bank v. Drake Roofing Co., 112 Iowa 186-192, 84 Am. St. Rep. 335, 51 L. R. A. 758, 83 N. W. 963, holding that when the guaranty is a letter of credit, or an effort to become responsible for a credit that may or may not be given to another, at the option of the party to whom the application for credit is made, the guarantor must within a reasonable time be notified of the acceptance of the guaranty: That if the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use, completes the contract: But if the guaranty is signed by the guarantor without any previous request of the other party and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

(Note.—See further, *Scribner v. Rutherford*, 65 Iowa 551, 22 N. W. 670; *Singer Mfg. Co. v. Littler*, 56 Iowa 601, 9 N. W. 905; *Davis Sewing Machine Co. v. Mills*, 55 Iowa 543, 8 N. W. 356; *Claffin v. Reese*, 54 Iowa 544, 6 N. W. 729; *Rodabaugh v. Pitkin*, 46 Iowa 544; *Case v. Howard*, 41 Iowa 479; *First Nat'l Bank of Dubuque v. Carpenter, Stibbs & Co.*, 41 Iowa 518; *Carman v. Elledge*, 40 Iowa 409; *Farwell v. Sully*, 38 Iowa 387; *Second Nat'l Bank of Rockford v. Gaylord*, 34 Iowa 246; *Crittenden v. Steele*, 3 G. Greene 538, some important cases on this question, not citing the text.—Ed.)

Cross references. See, also, in this connection, *Wright v. Griffith*, 6 L. R. A. 639; *Bishop v. Eaton*, 42 Am. St. Rep. 437.

SOUTHWICK & WHELOCK v. MCGOVERN, 28 IOWA 533

1. Partnership—Evidence—Person Dealing with Firm Under Belief that Certain Person is Member—Holding Self Out to Public as Partner.—Where a person claims that he dealt with a partnership and extended it credit under the belief that a certain other person was a member thereof, he may, in order to hold and bind the latter,

prove that at the time he extended the credit or dealt with the firm, he had knowledge of such facts and circumstances as would raise a reasonable presumption or belief that the person sought to be bound was a member thereof: And such knowledge derived from public notoriety is sufficient for the purpose, pp. 536, 537.

Reaffirmed and explained in Grey v. Callan, 133 Iowa 501, 110 N. W. 909, holding that where claim is made that one is an ostensible member of a partnership, testimony that by general repute he was a member of the firm, is admissible.

HACKETT v. HIGH, 28 IOWA 539

1. Actions—Equitable Defenses in Law Action—Trial—Practice—Circuit Court.—The defendant may (under the Code of 1860) plead equitable defenses in an action at law; and he has the right to have them tried as equitable issues. And in such a case it is entirely proper for the court to order, and, indeed, good practice demands under ordinary circumstances, that such issues be first tried and settled.

This rule applies to actions at law in the circuit court, pp. 540, 541.

Reaffirmed in Walker v. Kynett, 32 Iowa 528; Struman v. Robb, 37 Iowa 313.

Reaffirmed as to first paragraph in Morris v. Merritt & Co., 52 Iowa 502, 3 N. W. 509.

Reaffirmed and qualified in Tufts v. Morris, 115 Iowa 253, 88 N. W. 368, holding under Sec. 3435 of the Code of 1897, that where an equitable defense is pleaded to a law action, while that issue may be tried by the court, the right of plaintiff to a jury trial on the case he presents is not affected.

Cross reference. See further on this question, annotations and cross references under Byers v. Rodabaugh (17 Iowa 53), Vol. II, p. 491.

AMSDEN v. DUBUQUE & SIOUX CITY R. R. Co., 28 IOWA 542

(Former Appeal, 13 Iowa 132.)

1. Contracts—Breach of—Damages, Measure of—Liability of Party Succeeding to Rights Under Contract.—Where a railroad company for and in consideration of the use of certain land, covenants with the land owner that it will construct and perpetually maintain a side-track or switch along a street in a city, and in front of certain lots of the land owner, and after the construction of such track or switch abandons it, the land owner may sue and recover the difference between the value of the lots with the track or switch continued and maintained and the value of them without this.

And where another railroad company succeeds to the rights of the first company and assumes its indebtedness, and thereafter so abandons the track or switch, it is so liable to the land owner, pp. 541-544.

Unreported citation, 133 N. W. 773.

SCULLY *v.* SCULLY'S EX'R, 28 IOWA 548

1. Contracts—Assumpsit—When no Implied Promise to Pay for Services Rendered.—Where one person renders services for another which are known to and accepted by him, the law implies a promise on his part to pay therefor.

But where it is shown that the person rendering the service is a member of the family of the person served and receiving support therein, either as a child, a relative or a visitor, a presumption of law arises that such services were gratuitous; and, in such case, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving and by the other of making compensation therefor, pp. 550, 551.

Reaffirmed as to first paragraph in McCrary v. Ruddick, 33 Iowa 524.

Reaffirmed as to second paragraph in Haywood v. Woods, 28 Iowa 564, 565; *Smith v. Johnson*, 45 Iowa 310; *Wilson v. Wilson*, 52 Iowa 45, 2 N. W. 616; *Harper v. Kissick*, 52 Iowa 735 (abstract), 3 N. W. 452; *Keegan v. Malone's Estate*, 62 Iowa 211, 17 N. W. 462; *Chadwick, Ex'r, v. Devore*, 69 Iowa 640, 29 N. W. 758; *McGarvy v. Roads, Adm'r*, 73 Iowa 365, 35 N. W. 489; *Cowan v. Musgrave, Ex'r*, 73 Iowa 388, 389, 35 N. W. 498; *Resso v. Lehan*, 96 Iowa 49, 37 N. W. 962; *Tauk v. Rohweder*, 98 Iowa 157, 158, 67 N. W. 107; *Enger & Co. v. Lofland*, 100 Iowa 309, 69 N. W. 528; *Ridler v. Ridler*, 102 Iowa 473, 72 N. W. 672; *Donovan v. Driscoll, Ex'r*, 116 Iowa 341, 342, 90 N. W. 61; *Harrison v. Harrison, Ex'r*, 124 Iowa 528, 100 N. W. 345.

Reaffirmed as to second paragraph in Rogers v. Millard, 44 Iowa 469; *Magarrell v. Magarrell*, 74 Iowa 381, 37 N. W. 962; *In re Estate of Bishop*, 130 Iowa 253, 106 N. W. 638, cases, however, wherein the facts were held not to bring them within the rule, and the court held the rule of the first paragraph of the text to apply.

Reaffirmed and extended in Hart v. Flinn, 36 Iowa 369, holding further that the facts that a daughter had lived with her parents as a member of the family and had performed the usual services and duties as a daughter and received her support as a member of the family, creates no liability on the part of the parents to pay her for her labor, in the absence of express contract; and that a conveyance by the parents to the daughter based upon such facts is voluntary and without consideration.

Distinguished as to second and reaffirmed as to first paragraph in Harlan v. Emery, 46 Iowa 539; Wense v. Wykoff, 52 Iowa 646, 3 N. W. 687, holding that the rule of the second paragraph does not apply where a child or relative who is not a member of the family of a mother or other relation, or who is not a member of the latter's family, renders services to or supports the latter; but that in such cases the general rule of the first paragraph applies.

And see 146 Iowa 489, 125 N. W. 214.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

STATE v. KEELER, 28 IOWA 551

1. Appeal—Error in the Admission of Evidence—What Record to Show.—When upon appeal the appellant seeks to reverse the judgment below on the ground of error in the admission of evidence, the record must show that improper or incompetent evidence was admitted upon the trial below. The fact that the record shows that an improper or incompetent question was asked a witness is insufficient, unless the record discloses the answer thereto, and that it was incompetent and prejudicial, p. 552.

Reaffirmed and explained in Jenks v. Knott's Mexican Silver Mining Co., 58 Iowa 552, 12 N. W. 590, holding that in order to determine whether prejudice resulted to a party by reason of the exclusion of evidence, the answers, or the facts that they tend to establish, should appear in the record upon appeal; and unless prejudice be thus shown by the exclusion of the evidence, the Supreme Court cannot disturb the judgment for such a reason.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

2. Murder—Evidence—Corpus Delicti, Nature of Proof Required.—Upon the trial of an indictment for murder the *corpus delicti* must be proved either by direct testimony or by presumptive evidence of the most cogent or irresistible kind; but while the proof should be clear and distinct, it is not necessary that it should be direct and positive, p. 553.

Reaffirmed in State v. Minor, 106 Iowa 646, 77 N. W. 321, being an indictment for larceny.

*Reaffirmed and explained in State v. Westcott, 130 Iowa 8, 9, 104 N. W. 344, holding that while the *corpus delicti* must be proved in this State beyond a reasonable doubt, it may be established by circumstantial as well as by direct evidence.*

*Reaffirmed and extended in State v. Millmeier, 102 Iowa 698, 72 N. W. 277, holding further that the term "*corpus delicti*" means, when applied to any particular offense, that the particular crime charged has actually been committed by some one; that it is made up of two elements: 1st. that a certain result has been produced, as that a man*

has died, or a building has been burned, or a piece of property is not in the owner's possession; 2d. that some one is criminally responsible for the result.

3. Appeal by State in Criminal Case—Duty of Supreme Court.

—Upon an appeal by the State from a verdict and judgment of acquittal in a criminal case, the Supreme Court will—under Sec. 4926 of the Code of 1860—only give a correct exposition of the law, p. 554.

Reaffirmed in Columbus City v. Cutcomp, 61 Iowa 674, 17 N. W. 48, under Sec. 4539 of the Code of 1873, corresponding to the section of the text.

(Note.—There are other cases sustaining but not citing the text.—Ed.)

STATE v. POTTER, 28 IOWA 554

1. Criminal Conspiracy—Indictment for—Allegations of.—An indictment for criminal conspiracy must allege and show that the object of the conspiracy, or the means to be employed in its accomplishment were unlawful. And an indictment for criminal conspiracy where the object is not criminal, must specifically charge the means by which it was to be accomplished and thus show that the means to be employed were criminal, pp. 556, 557.

Reaffirmed in State v. Stevens, 30 Iowa 393-395, 397; State v. Harris, and Fulson, 38 Iowa 248, 249; State v. Ormiston, 66 Iowa 148, 23 N. W. 372; State v. Grant, 86 Iowa 221, 53 N. W. 121; State v. Clemenson, 123 Iowa 526, 99 N. W. 139; State v. Eno, 131 Iowa 620, 9 Am. & Eng. Ann. Cas. 856, 109 N. W. 119; State v. Hardin, 144 Iowa 270-272, 120 N. W. 473.

Reaffirmed and narrowed in State v. Savoye, 48 Iowa 564, 565; State v. Loser, 132 Iowa 425, 104 N. W. 339, holding that an indictment for conspiracy to do a criminal act need only describe the act by the name and terms it is known in the law. That the gist of the offense in such a case, is the unlawful combination or agreement, and no overt act is necessary to complete the offense, and such an act need not be alleged in the indictment.

Reaffirmed and narrowed in State v. King, 104 Iowa 729, 74 N. W. 692, holding that in order to constitute criminal conspiracy, the combination must contemplate the accomplishment of the criminal purpose by the united energy of the accused persons, or active participation by them must be shown. That mere knowledge, acquiescence, or approval of an act, without co-operation or an agreement to co-operate, does not constitute the crime of conspiracy.

Cited in State v. Ch. B. & Pac. Ry. Co., 63 Iowa 510, 19 N. W. 300, the court holding that an indictment (in this case for obstructing a highway) must state facts constituting an offense in language direct and certain as to the circumstances which are necessary to show a crime

punishable by the law; and it cannot be aided by intendment, nor omissions supplied by construction.

Cited in State v. Clark, 80 Iowa 519, (dissenting opinion, 520), 45 N. W. 910, the majority court holding that under Sec. 4298 of the Code of 1873, an indictment must be direct and certain as to the offense charged, and the acts necessary to constitute it must be set out and averred sufficiently for that purpose; and that an indictment cannot be aided by intendment, or an omission supplied by construction—The case involving the sufficiency of an indictment for assault with intent to inflict great bodily injury.

Cited in State v. Dankwardt, 107 Iowa 709, 77 N. W. 496, the court holding that while an indictment cannot be aided by intendment or construction, yet where the means used to accomplish the crime named in the statute are fully set forth, and the indictment then follows the language of the statute, it is, as a general rule, sufficient.—The case involving the sufficiency of an indictment for attempting to corrupt a juror.

Cited in State v. Jamison, 110 Iowa 341, 81 N. W. 596; State v. Gallagher, 123 Iowa 382, 98 N. W. 908; State v. Ashpole, 127 Iowa 682, 104 N. W. 282; State v. Moothart, 109 Iowa 133, 80 N. W. 301; State v. Von Kutzleben, 136 Iowa 96, 113 N. W. 487, the court holding—as does the present case in argument—that if the facts stated in an indictment do not constitute a crime, the indictment cannot be aided by intendment, or its omissions supplied by construction.

Cited in State v. McKinney, 130 Iowa 377, 378, 106 N. W. 934, the court holding that an indictment which is so broad and general in its terms that the accused may be put upon trial for any one of two or more distinct and independent criminal acts, and which is so indefinite in the charge preferred that the essential facts constituting the alleged offense may remain unknown to the accused until they are disclosed on the trial, is insufficient, under Secs. 5282, 5284 and 5289 of the Code of 1897.

Cited in State v. Weems, 96 Iowa 447, 65 N. W. 394, turning upon other points.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

2. Appeals in Criminal Cases—Duty of Supreme Court.—Upon an appeal by a person convicted of a crime or offense, the Supreme Court will—under Sec. 4925 of the Code of 1860—examine the whole record, and, without regard to technical errors, render such judgment as the law demands, irrespective of whether or not accused objected or raised the question of error below.

So upon an appeal by accused in a criminal case the Supreme Court will not affirm a judgment when it appears that the defendant is charged with no offense against the law, though he should in no stage

of the proceedings, either in the Supreme Court or in the court below, object on that ground, p. 558.

Reaffirmed in State v. Daniels, 90 Iowa 492, 58 N. W. 891, under Sec. 4538 of the Code of 1873, corresponding to the section of the text.

Reaffirmed and explained in State v. Nine, 105 Iowa 136, 74 N. W. 946, holding that—under the Code of 1897—the rule that objections not raised in the court below will not be considered in the Supreme Court does not apply in criminal cases.

Reaffirmed and explained in State v. Brown, 135 Iowa 41, 109 N. W. 1012, holding that unless an indictment is so fatally defective as to charge no offense, the accused cannot raise the question for the first time in the Supreme Court: That an objection to an indictment for duplicity must be raised below.

Cited in State v. Butcher, 79 Iowa 112, 44 N. W. 239, the court holding that an information cannot be amended, so as to state facts constituting the offense, after verdict is returned.

Distinguished and narrowed in State v. Westfall, and Mathews, 37 Iowa 576, holding that defendant in a criminal case as well as in a civil, must prosecute his appeal in the manner prescribed by law: And holding that a defendant who pays or satisfies a fine adjudged against him, thereby waives his right to be thereafter heard upon appeal.

LITTLE v. MARTIN, 28 IOWA 558

1. Appeal—General Exceptions to Instructions Given or to Charge of Court—When Supreme Court Will Not Review Errors in.—General exceptions to the instructions to the jury or to the charge of the court will not—under the Code of 1860—authorize a review of specific errors therein, when any of them or any part thereof is or are correct, p. 559.

Special cross reference. For cases citing and sustaining the text, and many others on this question, see annotations under Rule 5 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), Vol. II, p. 140.

WOODS v. GEVECKE, 28 IOWA 561

1. Appeal—Findings of Trial Court Treated as Verdict of Jury—Findings Against Weight of Evidence—Reversal for, when.—Upon an appeal to the Supreme Court the findings of the trial court will be treated as the verdict of the jury, and the judgment will not be reversed because they are against the weight of the evidence, unless they are palpably so, p. 562.

Reaffirmed and extended in Harper v. Buder, 88 Iowa 702, (abstract), 54 N. W. 203, holding further that the Supreme Court cannot disturb the judgment of the court below where the evidence is con-

flicting, unless there is an absence of evidence to support it, to such an extent that the presumption will arise that the decision of the court below was the result of passion or prejudice.

HAYWOOD *v.* WOODS, 28 IOWA 563

1. **Contracts—Account—Recovery for Items in Account Furnished According to Contract.**—Plaintiff may recover upon an account, although the items thereof were furnished according to contract, p. 564.

Cited in George, Weeks & Co. *v.* Swafford Bros., 75 Iowa 494, 39 N. W. 806, the court holding that where an original petition seeks to recover for an absolute sale of goods and the proof shows a conditional sale, and that the defendant agreed to take the goods and make arrangements to pay for them at a certain time, or to return them at such time, and that he failed to do so, the plaintiff may recover upon an amended petition conforming to the proof.

STATE *v.* SMITH, 28 IOWA 565

1. **Criminal Law—Trial—Peremptory Instruction to Acquit—When and When Not Proper.**—When upon the trial of an indictment there is *no testimony* to sustain the charge against the accused, or when it is so slight and indeterminate in its nature as that a verdict of guilty would be instantly set aside, the trial court may direct the jury to acquit the accused; but in all cases where there is a conflict of evidence, or any question of fact is left in doubt thereby, the court cannot take the case from the consideration of the jury, but must leave it to their determination under proper instructions, pp. 566, 567.

Reaffirmed in State *v.* Gibson, 97 Iowa 419, 66 N. W. 743.

CITY OF DUBUQUE *v.* WOOTON, 28 IOWA 571

1. **Municipal Corporations—Special Taxation for Grading, etc., Streets—Ordinance Requiring Publication of Resolution of City Council as to—Effect.**—Where the ordinance of a city pursuant to power conferred by charter provides that the city council may by resolution provide for the special assessment of abutting lots for grading and macadamizing its streets, provided the resolution be published in a certain manner, or number of times, the assessment of a special tax for such a purpose without the publication as required is of no effect, pp. 572-574.

Reaffirmed in Roche *v.* City of Dubuque, 42 Iowa 254; Zalesky *v.* City of Cedar Rapids, 118 Iowa 722, 92 N. W. 659.

Reaffirmed and explained in Hager *v.* City of Burlington, 42 Iowa 663; Starr *v.* City of Burlington, 45 Iowa 89, holding that it is competent for the city, when not inconsistent with restrictions of its charter, by ordinance, to prescribe the steps to be taken in order to

acquire jurisdiction over particular subjects: That if these steps are not taken, and the requirements of the ordinance are mandatory, the act of the city in an attempt to exercise authority, will be void.

Cited in Kendig v. Knight, 60 Iowa 32, 14 N. W. 79, not in point.

Partially overruled in Clifton Land Co. v. City of Des Moines, 144 Iowa 627, 630, 123 N. W. 342, holding that any errors, irregularities, omissions or defects of a city in relation to a special assessment for street improvements, and for which a remedy is given by appeal, under the Code of 1897 (N. B. See Secs. 823, 824 and 829 thereof), cannot be raised in an action for injunction.

Unreported citation, 131 N. W. 779; 136 N. W. 713.

HILL v. WOLFE, 28 IOWA 577

1. Taxation and Revenue—Power of County Board of Supervisors to Correct or Add to Assessment—Directory Statutes.—Sec. 739 of the Code of 1860, as amended by Chap. 24, Acts of Extra Session of 1861, providing that the county board of supervisors may at the regular meeting in June correct or add to the assessment, is directory; and such board may exercise such power at any time before the tax book is complete and has passed into the hands of the treasurer, and before any one can reasonably be misled thereby.

So the board may at a meeting in September add to the assessment, when the tax book for the year is not complete and has not passed into the hands of the treasurer, pp. 579, 582.

Reaffirmed and extended in Perrin v. Benson, 49 Iowa 326, 327, holding further that although Sec. 1778, provides that the board of supervisors shall levy school-house taxes along with other taxes for a given year, it is directory merely; and the board may levy such a tax the following year, when it is not shown that a tax payer is thereby prejudiced, such as by want of notice, or the like.

Reaffirmed and extended in Hubbell v. Polk County, 106 Iowa 619, 620, 623, 76 N. W. 856, holding further that although Sec. 9, Chap. 62, Acts of 1894, provides that the board of supervisors shall at the regular meeting in September levy an annual tax of six hundred dollars against any person carrying on or conducting a place for the sale of intoxicating liquors, and, also, against the real property and owner thereof, in which or upon which the place is located, &c., still, such tax may be levied by the board in December, when it does not appear that the delay prejudiced the rights of the person against whom it is levied.

Cited in Easton v. Savery, 44 Iowa 658, the court holding that although Sec. 746 of the Code of 1860, provides that the board of supervisors shall, at the regular session in June, each year levy the requisite taxes, and Sec. 2, of Chap. 24, of the text, provides that this shall be done at the September session of the board, a valid levy of taxes may be made by it at a meeting in June.

Cited in Snell v. City of Fort Dodge, 45 Iowa 569; Burlington Gas Light Co. v. City of Burlington, 101 Iowa 461, 462, 70 N. W. 629, the court holding that statutes fixing the time of levying taxes will be deemed directory, unless the tax payer by reason thereof will sustain some substantial injury.—The last case holding, also, that if a tax payer has an opportunity to be heard and to object to the assessment against him, as allowed by Sec. 831 of the Code of 1873, it is immaterial that the assessor's book was not completed and delivered on the day fixed by Sec. 825 of such Code (1st Monday in April).

Cited in Phelps v. Meade, 41 Iowa 475, the court holding that an error or irregularity in the manner of a sale of land for taxes, and an error in the tax deed, as to the day the sale was made, does not affect the validity of the tax title: That a tax deed to land made more than three years after the tax sale, is valid.

Distinguished in Gatch v. City of Des Moines, 63 Iowa 721, 726, holding that in all cases of the levying or assessment of property, the owner thereof must be given an opportunity to be heard, or show cause why the assessment should not be binding or conclusive upon him.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

Annotations to Decisions Reported in Volume 29 Iowa

CITY OF DUBUQUE *v.* NORTHWESTERN LIFE INSURANCE CO., 29 IOWA 9.

1. Municipal Corporations—Taxation and Revenue—Insurance Companies—Taxation of—Annual Premiums Received not Property or Subject to.—The premiums received by an agent of an insurance company is not property and is not assessable as such against the company, for taxation for city purposes.

Such premiums are in the nature of a gross income, and do not constitute property, pp. 12, 13.

Reaffirmed in City of Burlington *v.* Putnam Ins. Co., 31 Iowa 104, 105.

Cited in Hawkeye Ins. Co. *v.* French, 109 Iowa 590, 80 N. W. 661, the court holding that Sec. 1333 of the Code of 1897, providing for a tax on gross receipts of insurance companies, and exempting them from other taxation, is, to the extent of the exemption, unconstitutional.

GREENLEAF, ADMINISTRATOR, *v.* ILLINOIS CENTRAL RAILROAD CO.,
29 IOWA 14, 4 AM. REP. 181

1. Negligence—When Question of Law for Court and When Question of Fact for Jury.—In an action for damages for the death of one claimed to have been caused by the negligence of the defendant, when the evidence is undisputed and conclusively shows that the defendant was guilty of no negligence, or that the decedent was guilty of such contributory negligence as will defeat recovery by his administrator (the plaintiff), the question is one of Law for the court, and he may take the case from the jury; but where the facts are disputed, or the evidence is conflicting, the question must be left to the jury to decide, pp. 36, 37.

Reaffirmed in Greenleaf, Adm'r *v.* Dubuque and Sioux City R. R. Co., 33 Iowa 57; Grimmelman, Adm'r, *v.* Un. Pac. Ry. Co., 101 Iowa 82, 70 N. W. 93.

(Note. There are numerous cases, sustaining, but not citing, the text.—Ed.)

Cross reference. See other rules hereof, in this connection.

2. Master and Servant—Railroads—Duty to Provide Cars with Proper Appliances—Negligence.—It is the duty of a railroad company to provide its cars with such appliances as are reasonably calculated to insure the safety of its employees; and a failure to do so is negligence, pp. 41, 42.

Reaffirmed and explained in Cooper, Adm'r v. Cent. R. R. of Iowa, 44 Iowa 136, 137, holding that upon the trial of an action by an administrator for the death of a fireman caused in the operation of a train, instructions are proper, when authorized by the evidence, as follows, to wit:—

"I. It was the duty of the defendant to use all reasonable precaution for the safety of its employes, and among other things it was bound to furnish suitable machinery—materials sound and safe—and to keep it in such condition as would not endanger their safety; such as was least likely to do or cause injury. II. This, however, does not imply that the defendant was bound to use the highest skill, the greatest foresight, the most extraordinary care in procuring the very best appliances; but rather those appliances which were reasonably best calculated to answer the end proposed."

Reaffirmed and extended in Brann v. C. R. I. & P. R. R. Co., 53 Iowa 597, 599, 36 Am. Rep. 243, 6 N. W. 6, holding further that it is the duty of a railroad company to use ordinary care to see that cars are fit to be used, and that what constitutes such care, is to be measured by the character of the business, and the risks attending its prosecution; and that if an employe was injured by reason of a car being out of repair, it is for the jury to say, in an action for damages therefor, whether the defendant (railroad company) by the use of ordinary care could have discovered the defect; and that when an accident occurred because of defective appliances to a car, the railroad company, when sued, must show that in the selection and operation of machinery which caused, or contributed to, the accident, it used due care, prudence, skill and watchfulness.

Reaffirmed and varied in Martin, Adm'r v. Des Moines Edison Light Co., 131 Iowa 730, 731, 106 N. W. 361, holding that it is the duty of the master to use such reasonable care and diligence, as would an ordinarily careful and prudent person, under similar circumstances, to furnish a safe place for his employes to work, and to keep it so—failing which the master is liable in damages for injuries occasioned to an employe by reason thereof: That such a place is "Safe" when all the safeguards and precautions which ordinary experience, prudence, and foresight would suggest, have been taken to prevent injury to the employe while he is, himself, exercising reasonable care in the service which he undertakes to perform.

Reaffirmed and narrowed in Baldwin v. C. R. I. & P. R. R. Co., 50 Iowa 685, 686, holding that a railroad company is bound (under Sec. 1292 of the Code of 1873), to receive and haul cars of another railroad company, when the cars are such as are in common and ordinary use by other railroad companies, although not equipped with modern appliances; and that an employe of the receiving company cannot recover from it for personal injuries caused by reason of such cars not being so equipped.

(Note.—See further, *Foley, Adm'r v. Cudahy Packing Co.*, 119 Iowa 246, 93 N. W. 284; *Mosgrove v. Zimbleman*, 110 Iowa 169, 81 N. W. 227; *Fink v. Des Moines Ice Co.*, 84 Iowa 321, 51 N. W. 155; *Tuttle v. C. R. I. & P. R. R. Co.*, 48 Iowa 236; *Kroy v. C. R. I. & P. R. R. Co.*, 32 Iowa 357, some important cases on this question, not citing the text.—Ed.)

Cross references. See further, in this connection, *Railroad Co. v. Swett*, 92 Am. Dec. 206; *Ryan v. Fowler*, 82 Am. Dec. 315; *Portance v. Lehigh C. Co.*, 70 Am. St. Rep. 932; *Prescott v. Engine Co.*, 53 Am. St. Rep. 683; *Elledge v. Railroad Co.*, 38 Am. St. Rep. 290; *Meier v. Morgan*, 32 Am. St. Rep. 39; *Nadan v. Lumber Co.*, 20 Am. St. Rep. 29; *Coombs v. Cordage Co.*, 3 Am. Rep. 506; *Lewis v. Seifert*, 2 Am. St. Rep. 635; *Corcoran v. Halbrook*, 17 Am. Rep. 369; *Ill. Cent. R. R. Co. v. Welch*, 4 Am. Rep. 593.

3. Master and Servant—Railroad Company—Defective Cars—Liability of Company—Rule Fully Stated—Employee Acting under Directions or Instructions of Superior, etc.—In an action for damages for death (or injury to) of an employe by reason of a railroad company failing to supply a car with appliances making it reasonably safe to the employe, if the car is shown to have been so defective at the time of its construction, and so continued when put and used upon the railroad, it is not necessary to show further knowledge on the part of the defendant (company) or its agents, in order to fix its liability.

If, however, it was at one time safe and convenient, that is, had all the conveniences reasonably necessary for the safety of employes, and they were removed by accident or otherwise, then it should be shown that defendant either had notice thereof, or ought to have had, by the use of ordinary care, before an employe can claim liability on the part of the company on account of such defect. When once this knowledge is shown, or what is the same thing, culpability in lacking the knowledge, if it is claimed by the company that the injured employe also knew it, this knowledge by the latter, and that the service was commenced or continued with such knowledge by him, must be shown by the defendant (company).

If the danger or defect is known to the employe, or might have been known by the use of ordinary care, and there is no inducement to remain in the service, by promises to remove, to secure or remedy it, he assumes the risk and cannot recover. But even if the employe who was killed (or injured) knew of the defective car, if he acted under instructions and directions of a superior, the action will by no means be thereby defeated, pp. 46, 47.

Cited in Kroy v. Ch. R. I. & P. R. R. Co., 32 Iowa 303, the court holding that a railroad company is not liable in damages for the death of a brakeman caused by reason of uncoupling cars in motion, or in making a "flying switch" when the brakeman had helped make a

custom among employes so to do, or, having been in the employ for several months, had acquiesced in such a custom, and was acting voluntarily when killed.

Cited in Blair v. C. & N. W. R. R. Co., 43 Iowa 671, the court holding that in an action for damages for injuries to a brakeman by reason of a defective draw-bar on a car, that the plaintiff may recover when the proof shows that the defendant (company) had actual knowledge of the car being out of repair, the plaintiff (brakeman) having previous to the accident notified the defendant thereof, and that at the time of the accident, the plaintiff believed that the car had been repaired, and the defects remedied: And holding further that in such case, when the evidence justifies it, an instruction as follows, is proper, to wit:—

"If the draw-bar was defective, and the plaintiff had knowledge of it, and made objection thereto, and was induced to remain in the defendant's employment by promise or assurance of its repair, and within a reasonable time, and before its repair, and not having waived the objection, he was injured by reason of such defect, and he did not contribute to the injury by his own fault or negligence, he will be entitled to recover, but in such case greater care will be required of him than if he had not known of the defect."

Cited in Lumley v. Caswell, 47 Iowa 160, the court holding that if an employe has knowledge of the defective, or dangerous condition of machinery, or equal means of knowledge thereof with that of his master, and thereafter remains in the employment without complaint or protest, he cannot recover for injuries thereby thereafter occasioned.

Cited in Money v. Lower Vein Coal Co., 55 Iowa 673, 8 N. W. 653, the court holding that if a miner knew, or by the exercise of ordinary care might have known, of the unsafe condition of the roof, and he continued to work in the dangerous place without protest or complaint, without being induced to believe that a change would be made, he assumes the risk for injuries thereby occasioned, and cannot recover therefor.

Cited in Fox v. C. & St. P. & K. C. Ry. Co., 86 Iowa 375, 53 N. W. 261, 17 L. R. A. 289, the court holding that when, in an action by an employe of a railroad company for personal injuries, the proof shows that at the time of the accident he was acting under orders, and in an emergency that gave no time for reflection, the jury may find for him (the plaintiff), and that he was not guilty of contributory negligence.

Cited in Harper v. B. C. R. & N. Ry. Co., 88 Iowa 413, 45 Am. St. Rep. 242, 55 N. W. 318, the court holding that a general rule is that a person who accepts employment with knowledge of its risks does so at his peril, and has no claim on his employer for indemnity on account of such risks, and if the employe remains in the service of his employer without objection, and without promise of a change.

after obtaining knowledge of special hazards not known to him when the service was entered, he will be deemed to have waived the right to compensation for injuries which he may sustain by reason of such hazard: But the mere technical fact of the servant's knowledge of a defect is not sufficient to exonerate the master, if, for any reason, the servant forgets it, and is not in fault in forgetting it, at the precise time he suffers thereby; and that the servant's rights are not prejudiced by his forgetfulness or failure to observe a defect, under the influence of sudden alarm, or of an urgent demand for speed, or if his duties are such as necessarily to absorb his whole attention, leaving him no reasonable opportunity to look for defects.

Cited in Strong v. Iowa Cent. Ry. Co., 94 Iowa 392, 62 N. W. 803, the court holding that where a brakeman is injured while attempting to make a coupling of cars, and is acting under orders of a superior, in a case of emergency and to save passengers from imminent danger, the company is liable therefor, although, but for such facts, the brakeman would have been guilty of contributory negligence.

Cited in Cowles v. C. R. I. & P. Ry. Co., 102 Iowa 510, 71 N. W. 581, the court holding that when one employed to turn a Turntable knows of a defect therein, but makes no complaint, and receives no promise for its repair, he cannot recover for injuries occasioned thereby after such time, and while he continues in such service.

Cited in Kerlin v. Ch. & N. W. Ry. Co., 149 Iowa 446, the court holding that the master must observe reasonable care in giving orders to his servant and in sending him into places or situations where he is subject to greater hazard than naturally pertain to the particular service when performed under rational and proper supervision; and a prudent servant has a right to depend upon the ability and skill of the agent or vice-principal in whose charge the common master has placed him, and is not bound to set up his own judgment in resistance to that of his superior; and this is, ordinarily, true even where the servant knows or has apprehension of the danger; for his position is one of subordination and obedience, and he may, within reasonable limits, suppress his fears and suspicions in reliance upon the superior knowledge of the master: But this rule, in the absence of a governing statute, is subject to the general limitation that the order of the master or vice-principal cannot be relied upon to sustain an action, where the hazard is so clearly imminent or certain that a reasonably prudent servant would refuse obedience; or if the danger to be apprehended in obeying the order is better known to the servant than to the master giving the order; or if the servant fully appreciates the nature and extent of the risk to which he is exposed, he is held to assume it.

Distinguished and qualified in Moran v. Harris, 63 Iowa 394, 395, 19 N. W. 279, holding that although an employe by remaining in the service of the employer without objection, assumes the risk of such dangers as are occasioned by defects in the machinery about which he is employed, of which he has knowledge, or of which, in

the exercise of reasonable care and diligence he might have knowledge, yet he only assumes the risk of such dangers as might be occasioned by the defect in the machinery, while being used in a reasonably prudent and careful manner, and does not assume risks of such dangers as would be created by the careless or negligent manner in which the defendant might use the defective machinery.

Unreported citation, 128 N. W. 550.

(Note. There are many other cases, sustaining, but not citing, the text.—Ed.)

4. Negligence—Burden of Proof—Proof Required of Plaintiff.—In an action of damages for death, or personal injuries, occasioned by negligence of the defendant, the burden of proof is on plaintiff, administrator, or plaintiff, injured, as the case may be, to show both the negligence of the defendant, and his own or his decedent's care; but he is not bound to do more than raise by his proof a reasonable presumption of the negligence of the defendant and his own or his decedent's care, p. 46.

Reaffirmed in Carlin v. Ch. R. I. & P. R. R. Co., 37 Iowa 322; Patterson v. D. & M. R. R. Co., 38 Iowa 280; Murphy v. C. R. I. & P. R. R. Co., 45 Iowa 664; Burns v. Ch. M. & St. P. Ry. Co., 69 Iowa 457, 58 Am. Rep. 227, 30 N. W. 28; Bell, Adm'r v. Town of Clarion, 113 Iowa 127, 84 N. W. 639; Lunde, Adm'r, v. Cudahy Packing Co., 139 Iowa 696, 117 N. W. 1067.

Reaffirmed and explained in Muldowney v. Ill. Cent. R. R. Co., 32 Iowa 180; Hamilton v. Des Moines Valley R. R. Co., 36 Iowa 38, holding that it is the duty of an employe of a railroad company to exercise ordinary care to avoid the dangers of his employment, but he is not bound to exercise care and diligence to avoid dangers which are the result of negligence of the company, and which he could not have known and avoided by the use of such care.

Reaffirmed and explained in Muldowney v. Ill. Cent. R. R. Co., 32 Iowa 180, holding, also, that each party to an action has the right to have the jury instructed upon the law of the case, clearly and pointedly, and so as to leave no ground for misapprehension or mistake; and an instruction which is not in clear and unmistakable language, is reversible error upon appeal.

Reaffirmed and explained in Way, Adm'r v. Ill. Cent. R. R. Co., 40 Iowa 344, 345, holding that in an action by an administrator against a railroad company for death of a brakeman, it is reversible error for the court to give the following instruction to the jury, to-wit:—

"To entitle the plaintiff to recover in this action, the plaintiff must prove to the satisfaction of the jury, or else it must otherwise appear in the evidence to the satisfaction of the jury, that the deceased was injured by the negligence of the defendant whilst the deceased was observing ordinary care on his part to avoid injury, or did not by his own negligence contribute to the injury."

Reaffirmed and explained in Lang v. Holliday Creek R. R. & Coal Mining Co., 49 Iowa 472, holding that in an action for an injury to or the death of a person, claimed to have been caused by the negligence of the defendant, the burden of proof is on the plaintiff to show, either by direct proof or from circumstances, that the person injured or killed did not contribute thereto by his own negligence.

Reaffirmed and explained in Fish, Adm'r v. Ill. Cent. R. R. Co., 96 Iowa 704, 65 N. W. 996, holding that the want of contributory negligence to be shown by plaintiff as set out in the text, need not be shown by direct evidence, but may be inferred from circumstances.

Reaffirmed and extended in Gamble v. Mullin, 74 Iowa 101, 36 N. W. 910, holding further that in an action for negligence which injured plaintiff's animal and afterwards caused its death, the plaintiff who had control of it after the injury, must prove that the injury and death was not proximately caused by his negligence or want of care; and this is the rule although the defendant specially pleads contributory negligence.

Cited in Sedgwick v. Ill. Cent. R. R. Co., 76 Iowa 343, 41 N. W. 36; *Contri*, Adm'r v. Hollingsworth Coal Co., 143 Iowa 120, 121 N. W. 508, cases wherein the plaintiff or plaintiff's decedent were held to have been guilty of contributory negligence, barring recovery.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross references. See other rules hereof. See further on this question, annotations under McAunich v. M. & M. R. R. Co., (20 Iowa 338), Vol. II, p. 823; Donaldson et al., Adm'rs v. M. & M. R. R. Co., (18 Iowa 280), Vol. II, p. 627.

5. Negligence—Negligence Contributory—Evidence, What May be Considered—Instinct of Self-preservation.—Upon the trial of an action for personal injury or death of a person alleged to have been caused by the negligence of defendant, in arriving at whether or not the injured or deceased person was guilty of contributory negligence, the jury may consider and give due weight to the instinct of self-preservation which naturally lead men to avoid injury and preserve their lives, p. 48.

Reaffirmed in Reynolds v. City of Keokuk, 72 Iowa 372, 34 N. W. 167; *Hopkinson v. Knapp & Spalding Co.*, 92 Iowa 332, 60 N. W. 655; *Baker, Adm'r v. C. R. I. & P. Ry. Co.*, 95 Iowa 170, 63 N. W. 670; *Bell, Adm'r v. Town of Clarion*, 113 Iowa 127, 84 N. W. 963; *Ames, Adm'x v. Waterloo & Cedar Rapid Transit Co.*, 120 Iowa 646, 95 N. W. 162.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

Cross reference. See other rules hereof, in this connection.

6. Trial—Instructions—Construction of Language in—Instructions not Considered Misleading.—In the instructions or charge

to the jury, the court is not bound to select such language as will prevent all possibility of misapprehension; but when language is employed which is not fairly calculated to deceive or mislead, the instructions or charge will not be objectionable on the ground that they, or it, are or is misleading or confusing.

So upon the trial of an action for damages by an administrator for death of his decedent caused by a defective appliance on a railroad car, the language in an instruction, "the car which produced the accident," is not objectionable on such ground, pp. 42, 43.

Distinguished and narrowed in Perrigo v. C. R. I. & P. R. R. Co., 55 Iowa 327, 328, 7 N. W. 628, holding that an instruction is erroneous when it uses language which assumes *as true* a material fact upon which the evidence is *conflicting*.

VOORHIES v. ATLEE, 29 IOWA 49

1. Promissory Notes—Waiver of Notice by Guarantor of Non-Payment by Maker—Effect—Demand Necessary.—A waiver by a guarantor of a promissory note of notice of non-payment, does not excuse a failure to present the note to the maker for payment, p. 51.

Reaffirmed in Whitely v. Allen, 56 Iowa 225, 41 Am. Rep. 99, 9 N. W. 190.

2. Promissory Note—Guarantor of Collection of—Obligations of—Due Diligence Required of Holder, what is.—The obligations assumed by a guarantor of the collection of a note are, that he will pay it if the maker fails to pay at maturity, and the holder shall use due diligence by action to collect it, and shall be unable to so do. Due diligence, generally, and in the absence of any special facts, requires action to be instituted at the first regular term of court after maturity, and the obtaining judgment and execution thereon as soon as practicable by the ordinary rules and practice of the court, p. 51.

Reaffirmed in Durand v. Bowen, 73 Iowa 575, 35 N. W. 645.

Reaffirmed and explained in Sommers v. Barrett, 65 Iowa 293, 294, 21 N. W. 647, holding the rule to apply in case of the guarantee of the collection of a negotiable promissory note made by indorsement, unless the holder shows a reasonable excuse for his failure to use due diligence to collect the note from the maker.

Cross references. See further on this question, annotations under Peck v. Fink (10 Iowa 193), Vol. I, p. 666; and see Negotiable Instrument Law, Code Supplement of 1907, in this connection.

CURTIS v. RAYMOND BROS. & CO., 29 IOWA 52

1. Garnishment—Mortgagee of Personal Property, Liability of.—A mortgagee of personal property who has not taken possession of it, cannot be compelled to take possession thereof, by an attachment creditor of the mortgagor, and is not liable to such creditor for said

property or its overplus of value after the satisfaction of his mortgage debt, in the absence of fraud or collusion, pp. 52, 53.

Reaffirmed in First Nat'l Bank of Newton v. Perry, 29 Iowa 266.

Cross reference. See further in this connection, annotations under Torbert v. Hayden, sheriff (11 Iowa 435), Vol. I, p. 840.

SPENCER v. ILLINOIS CENTRAL R. R. CO., 29 IOWA 55

1. Negligence—Contributory.—No one can recover damages for an injury of which his own negligence was in whole or in part the proximate cause, p. 58.

Reaffirmed, explained and extended in Greenleaf, Adm'r v. Ill. Cent. R. R. Co., 29 Iowa 47; Reynolds v. Hindman, 32 Iowa 149; Muldowney, Adm'r, v. Ill. Cent. R. R. Co., 32 Iowa 180; Carlin v. Ch. R. I. & P. R. R. Co., 37 Iowa 322; Artz v. C. R. I. & P. R. R. Co., 38 Iowa 296, 297; Cooper v. Central R. R. of Iowa, 44 Iowa 138; Lang v. Holiday Creek R. & Coal Mining Co., 49 Iowa 472; Funston v. Ch. R. I. & P. R. R. Co., 61 Iowa 462, 16 N. W. 523; Kerns v. Ch. M. & St. P. Ry. Co., 94 Iowa 125, 62 N. W. 693, holding that in an action for damages for personal injuries, the burden is on the plaintiff to show both the negligence of the defendant, and his own ordinary care; but that this may be shown by facts and circumstances as well as by direct proof—And some of these cases holding that the rule is equally applicable to an action by an administrator for death of his decedent; and he must show the negligence of the defendant and ordinary care of his decedent.

Reaffirmed and narrowed in Keefe, Adm'r v. Ch. & N. W. Ry. Co., 92 Iowa 186, 54 Am. St. Rep. 542, 60 N. W. 504; Orr v. Cedar Rapids & Marion City Ry. Co., 94 Iowa 429, 430, 62 N. W. 853; McCormick v. Ottumwa Ry. & Light Co., 146 Iowa 129, 130, 124 N. W. 893, holding that in an action for damages for personal injuries alleged to have been caused by the negligence of the defendant, plaintiff's negligence will not enable defendant to escape liability, if the act which caused the injury was done by defendant after it discovered the plaintiff's negligence, and if the defendant could have avoided the injury, in the exercise of reasonable care.

Cross references. See other rules hereof. See further on this question, annotations under Greenleaf, Adm'r v. Ill. Cent. R. R. Co. (29 Iowa 14), ante, p. 489; Rule 3 of McAunich v. M. & M. R. R. Co. (20 Iowa 338), Vol. II, p. 823; Rule 5 of Donaldson et al., Adm'r's v. M. & M. R. R. Co., (18 Iowa 280), Vol. II, p. 627.

2. Railroad Companies—Signals at Public Crossings.—There is no statute in this State, nor is there any rule of law requiring those in charge of a railroad train to give signals of its approach to a public crossing by ringing the bell and blowing the whistle, p. 59.

Reaffirmed, explained and qualified in Artz v. Ch. R. I. & P. R. R. Co., 34 Iowa 157, 158, holding that even where there is such a

statute as referred to in the text in force, the omission to comply with it does not make the railroad company absolutely liable for an injury to one at a crossing where the signals are omitted, but only where the injury was caused without the contributory negligence of the person injured; or, in other words, when the injury results from the omission, is caused by it alone, the railroad company is liable, but not, if caused by the negligence of the injured person: But that the absence of such a statute does not in all cases relieve the railroad company of the duty to sound the bell or blow the whistle; but that if obstructions, for instance, at a crossing were such as to make it impossible for a person approaching it to see the train, and impossible or very difficult as to hearing it, in such and similar cases, it is the clear duty of the railroad company to ring the bell or sound the whistle, so as to warn persons of the approach of the train, and an omission to do so, even in the absence of a statute requiring it, will be negligence, if so found by a jury, rendering the company liable for injury resulting therefrom.

Cross reference. See Rule 3 hereof, in this connection.

3. Railroads—Public Crossings—Duty of Traveler of Public Road when Approaching Railroad Crossing—"Stop, Look and Listen" is not the Rule.—A traveler of a public road is not required when approaching a railroad crossing, to "stop, look and listen:" He is only required to take every reasonable precaution to ascertain whether a train is approaching, or, in other words, to exercise ordinary care to see that the track is clear of trains before attempting to cross it, p. 60.

Reaffirmed in Dodge v. B. C. R. & M. R. R. Co., 34 Iowa 280, 281; Funston v. Ch. R. I. & P. Ry. Co., 61 Iowa 462, 16 N. W. 523.

(Note.—There are other cases, sustaining, but not citing the text.—Ed.)

WARE v. THOMPSON, 29 IOWA 65

1. Tax Sale of Several Parcels of Land En Masse, When May be Made—Tax Deed Showing Such Fact Is Void.—A tax deed showing on its face that several parcels or tracts of land were sold in gross for a lump sum, is void; but such sale is valid when such parcels or tracts are *assessed in a body*, pp. 66, 67.

Special cross references. For cases citing and sustaining the text, and many others on this question, see annotations under Corbin v. De Wolf (25 Iowa 124), ante. p. 244; Boardman v. Bourne (20 Iowa 134), Vol. II, p. 791.

2. Demurrer in Equity Action—Standing on and Appeal—Reversal—Remanding with Leave to Amend.—Where a demurrer to a pleading in an equity action is overruled, and the demurrant stands by his demurrer and appeals to the Supreme Court, and the higher court decides that the demurrer should have been sustained,

the cause will be reversed and remanded, and the party whose pleading is adjudged defective may, after such remanding, amend it, p. 68.

Reaffirmed and extended in White v. Farlie, 67 Iowa 629, 630, 25 N. W. 837, holding further that upon an appeal in an equity cause the Supreme Court may reverse and remand in a proper case and for the purpose of effectuating justice.

(Note.—See further, Tuscar v. Marshall, 4 Iowa 544; Lyon v. Tevis, 8 Iowa 79; Jones v. Clark, 31 Iowa 497; Miller v. Corbin, 48 Iowa 525; Sweet v. Brown, 61 Iowa 669, 17 N. W. 44, some important cases in this connection, not citing the text.—Ed.)

RANSOM v. BOAL, 29 IOWA 68, 4 AM. REP. 195

1. Municipal Corporations—Public Square of City Held in Trust for Public—Cannot be Sold for City's Debt.—A public square of a city is held in trust by the city for the use of the public and for the purposes for which it was dedicated; and it cannot be sold under execution to satisfy the city's debt, p. 70.

Special cross reference. For cases citing the text, and many others in this connection, see annotations under City of Des Moines v. Hall (24 Iowa 234), ante. p. 175.

HARRENCOURT, ADMINISTRATOR v. MERRITT & BRO., 29 IOWA 71

1. Limitation of Actions—Part Payment Insufficient to Prevent Bar—New Promise Must be in Writing.—Under Sec. 2751 of the Code of 1860, part payment is insufficient to prevent a debt being barred by the statute of limitation; and a new promise must be in writing, signed by the party to be thereby charged, in order to have this effect, p. 72.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Rule 1 of Parsons v. Carey (28 Iowa 431), ante. p. 467.

MANDERSCHID v. CITY OF DUBUQUE, 29 IOWA 73, 4 AM. REP. 196

(Former Appeal, 25 Iowa 108.)

1. Highway—Dedication, proof of—Acceptance by Public, proof of.—The question of whether or not there has been a dedication of a highway to the public is to be determined from all the facts and circumstances of the case, and, as against the owner of the soil, such proof must sufficiently show the *animus dedicandi*.

Acts of the owner of the land, implying his assent to its use as a highway and indicating an *animus dedicandi*, when accompanied by user on the part of the public, without regard to the time during which the road or way has been used, are sufficient to authorize an inference of prior dedication.

Continued and uninterrupted user of a highway for the ten years prescribed by the statute of limitation (Code of 1860) for the recovery of real estate, is sufficient to raise the presumption of a prior dedication.

Although to authorize the establishment of a highway by dedication, acceptance thereof by the public authorities is necessary, still this may be proved by facts and circumstances; and the fact that work to repair it was done by proper authority, is sufficient therefor, pp. 79-83.

Reaffirmed in Hull v. City of Cedar Rapids, 111 Iowa 469, 470, 83 N. W. 28.

Reaffirmed and explained in Davis v. City of Clinton, 58 Iowa 391, 10 N. W. 768, holding that a highway which is established by prescription or use, can only be the width actually used by the public during the period required to so establish it.

Reaffirmed and explained in Snouffer v. C. R. & M. City Ry. Co., 118 Iowa 296, 297, 92 N. W. 83, holding that dedication of realty to public use may be accomplished without any deed or formal act by the dedicator, and without any formal declaration of acceptance by the public authorities; and the dedication may be shown by the verbal declarations of the owner, by his act in filing the plat, by his silence in the face of known adverse possession by the public, or by any other act or omission from which the intention to dedicate may fairly be inferred; while acceptance may, also, be inferred from general use of the road or way by the public, or by the improvement and repair thereof by the authorities having care and control of the highways.

Reaffirmed and explained in Davis v. Town of Bonaparte, 137 Iowa 202, 114 N. W. 898, holding that the distinction between dedication and prescription is this: The first is established by proof of an act of dedication and of the *animus dedicandi*, without reference to the period of use; in the second, long user is an essential ingredient: The intention of the owner to set apart the lands for the use of the public as a highway—the *animus dedicandi*—is the fundamental principle, the very life of dedication.

Reaffirmed and explained in part in Bell v. City of Burlington, 68 Iowa 298, 27 N. W. 245; Johnson v. City of Burlington, 95 Iowa 200, 201, 63 N. W. 695, holding that acceptance by the public is as necessary as the fact of dedication; and that both must be proved in order to establish a highway by dedication: But holding that a city is not obliged to accept the entire width of a street dedicated, but may accept a portion of the width thereof.

Reaffirmed and explained in part in City of Waterloo v. Union Mill Co., 72 Iowa 439, 440, 34 N. W. 197, holding that acceptance of a street by the city authorities after its dedication, although essential, may be proved by its use by the public.

Reaffirmed and explained in part in Town of Cambridge v. Cook, 97 Iowa 601, 66 N. W. 884; Brown v. Taber, 103 Iowa 2, 72

N. W. 416, holding that acceptance of lands dedicated for public purposes is essential to be shown, but that slight evidence is sufficient for the purpose.

Reaffirmed and explained in part in Hunter v. City of Des Moines, 144 Iowa 545, 123 N. W. 217, holding that when all parties interested, and lot owners, recognize a plat of land and a street dedicated thereon, and consent to a decree in conformity to such plat, and thereafter convey land in reference to and conformity therewith, such acts constitute a dedication of the street.

Special cross reference. For further cases citing and sustaining the text, and many others on the question, see annotations under Onstott v. Murray (22 Iowa 457), ante. p. 56.

Cross references. See further on this question, annotations under City of Pella v. Scholte (24 Iowa 283), ante. p. 181; Morrison v. Marquardt (24 Iowa 35), ante. p. 145; Keyes & Crawford v. Tait (19 Iowa 123), Vol. II, p. 704.

2. Municipal Corporations—Liability for Injuries to Animal Caused by Defective Bridge.—A city is liable in damages for injuries to an animal occasioned by a defective bridge which is part of a highway, or street therein, or which is in such near proximity to the highway or street, as to be dangerous to persons using the latter, pp. 75-77, 87, 88.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Manderschied v. City of Dubuque (25 Iowa 108), ante. p. 243.

HATCH v. JUDD, 29 IOWA 95

1. Actions—Practice—Action on Wrong Docket—When Objection Waived.—An objection that an action is brought at law when it should have been brought in equity, or *vice versa*, is—under Sec. 2615 of the Code of 1860—waived, if the defendant does not, before or at the time of filing his answer, move to have the cause transferred to the proper docket, pp. 97, 98.

Reaffirmed and explained in Weaver v. Knitzley, 58 Iowa 193, 12 N. W. 263, holding that an objection as to the form of the action, is waived by going to trial without making it.

Cited in Green v. Marble, 37 Iowa 96, the court holding that an objection that plaintiff's remedy was by action in equity, instead of at law, or *vice versa*, cannot be raised for the first time upon appeal to the Supreme Court.

Cross references. See further on this question, annotations under Rules 1 and 2 of Van Orman v. Merrill (27 Iowa 476), ante. p. 425; Rules 1-3 of Byers v. Rodabaugh (17 Iowa 53), Vol. II, p. 491.

2. Costs—Successful Party not Always Entitled to Full Costs—Apportionment of—Judicial Discretion of Trial Court.—A successful party is not entitled, as a matter of course and of law, to full costs, under Sec 3449 of the Code of 1860; but if there be equitable circumstances, such as the plaintiff or successful party failing in part of his demand, the costs being unnecessarily large by the act or acts of the successful party, or the like, the trial court may, within a sound discretion, apportion the costs as to him seems right, p. 98.

Reaffirmed in Andrews v. Zimmerman, 42 Iowa 708 (abstract), under Sec. 2933 of the Code of 1873, corresponding to the section of the text.

Cross reference. See further in this connection, annotations under Arthur v. Funk (22 Iowa 238), ante. p. 25.

ROOT v. ILLINOIS CENTRAL R. R. CO., 29 IOWA 102

1. Appeal—Excessive Judgment—Necessity of Exceptions below.—Although Chap. 49, Acts of 1866, dispenses with a motion for a new trial on the ground that a judgment is excessive, before appeal, yet it does not abrogate the rule requiring the party complaining thereof to except thereto before prosecuting his appeal; and when he fails to so do the judgment will not be reversed for such cause, p. 104.

Reaffirmed and explained in Ellis v. Leonard, 107 Iowa 490, 78 N. W. 247, holding that Sec. 3169 of the Code of 1873, expressly provides that the Supreme Court, on appeal, may review and reverse any judgment or order of the superior or district court, although no motion for new trial was made in such court; but that this pre-supposes an exception properly taken below.

Special cross reference. For further cases citing, and sustaining the text, and others, see annotations under Dickey v. Harmon (26 Iowa 501), ante. p. 354.

Cross references. See further on this question, annotations and cross references under Webster v. Cedar Rapids & St. P. R. R. Co. (27 Iowa 315), ante. p. 407; Rule 1 of Coffin, Ex'r v. City Council of Davenport (26 Iowa 515), ante. p. 358.

LUMBERT & CO. v. PALMER, 29 IOWA 104

1. Pleadings—Facts to be Stated in—Evidence to Agree with Facts Pleaded—Action Against Indorser of Negotiable Instrument.—Our system of pleading—Secs. 2875 and 2880 of the Code of 1860—requires a party to plead the facts on which he relies to sustain his cause of action or defense; and his evidence must agree with the facts pleaded.

So the holder of a negotiable bill or note cannot, in an action against an indorser, aver in his petition, demand on the maker, protest and notice thereof to the indorser, and recover upon evidence showing a waiver thereof by the defendant (indorser), pp. 108, 109.

Reaffirmed in Colsz & Michelson v. Miracle, 103 Iowa 200, 72 N. W. 503.

Reaffirmed and explained as to first paragraph in Woolsey v. Williams, 34 Iowa 415; Smith v. State Ins. Co., 64 Iowa 720, 21 N. W. 147, holding that the evidence must correspond with the allegations of the pleading, and the rights of the parties must be determined upon the facts in issue.

Reaffirmed and explained as to the first paragraph in Berhard v. Washington Life Ins. Co., 40 Iowa 443, 444; Edgerly v. Farmers' Ins. Co., 43 Iowa 590, 591; Fauble & Smith v. Davis, 48 Iowa 466; Welsh v. Des Moines Ins. Co., 71 Iowa 339, 32 N. W. 371; Eiseman v. Hawkeye Ins. Co., 74 Iowa 15, 36 N. W. 781, holding that a plaintiff cannot recover except upon evidence sustaining his cause of action as set out in his petition; and cannot recover upon evidence showing a right to recover which is not pleaded by him.

Cited with approval in Ruby v. Schee, 51 Iowa 425, 1 N. W. 745, turning upon other points.

Cited in Robinson & Co. v. Berkey & Martin, 100 Iowa 144, 62 Am. St. Rep. 549, 69 N. W. 436, the court holding that a pleading should state ultimate facts and not the evidence of such facts.

Distinguished in Peck v. Schick & Co., 50 Iowa 285, holding that where, in an action by the holder of a negotiable note against the indorser thereof, the plaintiff proves that the defendant waived want of due notice, this is equivalent to pleading that no such notice was given.

CLISE v. FREEBORN, 29 IOWA 110

1. Appeal—Errors Not Argued Not to be Considered by Supreme Court.—Errors and points not argued and relied upon by counsel, will not be considered by the Supreme Court, although they be embraced in the assignment of errors, p. 112.

Reaffirmed in Abbott v. Board of Supervisors of Scott County, 36 Iowa 356.

Cited in Heaton v. Fryberger, 38 Iowa 207, (dissenting opinion), the majority court opinion not in point.

Cross reference. See further on this question, annotations under Shaw v. Brown (13 Iowa 508), Vol. II, p. 180.

THOMPSON v. REID, 29 IOWA 117

1. Courts—Circuit Court—Jurisdiction—Certiorari.—The Circuit Court is of limited jurisdiction, limited by the Act creating it. It has not jurisdiction of a proceeding of *Certiorari*.

Certiorari is a special proceeding, pp. 117, 118.

Reaffirmed in Hunt v. Free, 29 Iowa 157; Ainsworth v. House, 31 Iowa 504, 505; Connell v. Stetson, 33 Iowa 149.

Cited in College of Physicians and Surgeons of Keokuk v. Guilbert et al., State Board of Examiners, 100 Iowa 220, 59 N. W. 455,

the court holding that under Sec. 769 of McClain's Code, the superior court has jurisdiction in *Certiorari* proceedings.

2. **Certiorari—When Proper.**—*Certiorari* is only a mode of redress where the more common remedy by appeal is not provided, p. 118.

Cited in Connel v. Stetson, 33 Iowa 149, the court holding that injunction lies to restrain the collection or enforcement of a void judgment.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

STATE v. KNOUSE, 29 IOWA 118

1. **Homicide—Murder in the First Degree—Necessary Averments of Indictment—Murder in Second Degree.**—Under Sec. 4192 of the Code of 1860, an indictment for murder in the first degree where the deceased was not killed by means of poison, or by accused lying in wait, or in the attempt to perpetrate arson, rape, robbery, mayhem or burglary, must charge that the killing was done with malice aforethought, and wilfully, deliberately and premeditatedly; that is, the indictment must allege an intent to kill by accused, and that the killing was so done, and with malice aforethought, willfully, deliberately and premeditatedly; but if such indictment fails to so aver, when these averments are so required, it is good as an indictment for murder in the second degree, p. 119.

Reaffirmed in State v. Stanley, 33 Iowa 529, 530, holding that an indictment for murder in the first degree, which is otherwise sufficient under the rule of the text, need not charge that the accused killed and *murdered* deceased, if words equivalent thereto are employed and the crime is charged in ordinary language so as to enable a person of common understanding to know what is intended.

Cross references. See Rule 2 hereof. See further on this question, annotations under State v. McCormick (27 Iowa 402), ante, p. 416.

2. **Homicide—Indictment Charging Murder in Second Degree—Trial for First Degree, Reversible Error.**—Where an indictment charges only murder in the second degree, it is reversible error to put accused upon trial for murder in the first degree thereunder, although he may be duly convicted upon the trial, of murder in the second degree, pp. 119, 120.

Reaffirmed and varied in State v. Weese, 53 Iowa 94-96, 4 N. W. 829, holding that where—under Sec. 3849 of the Code of 1873, corresponding to the section of the text—an indictment charges that a murder was committed in the perpetration of robbery and burglary, it charges murder in the first degree, a conviction thereunder cannot be had for the second degree, and a verdict of "guilty as charged in the indictment" is a conviction of murder in the first degree.

Special cross reference. For further cases citing and sustaining the text, and others, see annotations under *State v. Boyle* (28 Iowa 522), ante. p. 478.

CONRAD v. GIBBON, 29 IOWA 120

1. Contracts and Notes—Usury.—A note secured by mortgage on land is not usurious on its face, when it is in the following language, to-wit:—

"480. Iowa City, August 8, 1855. One year after date, for value received, we promise to pay V. L. C. or order, at the banking-house in Iowa City, the sum of four hundred and eighty dollars; and if not paid when due, we promise to pay, as a penalty for the default, interest on the said sum at the rate of twenty per cent. per year from maturity. This note may run at above rate for two years, interest to be paid annually." But in such case the twenty per cent. will be construed as a penalty, and interest will be allowed at the rate of six per cent. per annum; but if it be shown that such note was given in such form with the intent to evade the usury laws, it will be held usurious, p. 121.

Special cross reference. For cases citing the text, and others in this connection, see annotations under *Gilmore & Smith v. Ferguson & Cassell* (28 Iowa 226), ante. p. 445.

ADKINS v. FLEMMING, 29 IOWA 122

1. Gambling—Gaming Contracts—Recovery by Loser—When Allowed.—A party losing money on a wager, bet, or gambling contract, may maintain an action therefor against the stakeholder at any time before it is paid over to the winner.

So if, after being notified by the loser of a wager not to do so, the stakeholder turns over money to the winner, then the loser may recover such sum against the stakeholder, pp. 122, 123.

Reaffirmed and explained *Munns v. Donovan Commission Co.*, 117 Iowa 520, 91 N. W. 790, holding that where money is deposited in the hands of a person for the purpose of dealing in futures, or speculating on the rise and fall of markets, it may be recovered at any time before purchases are made with it.

Reaffirmed and varied in *Himmelman v. Pecant*, 133 Iowa 505, 506, 110 N. W. 920, holding that where a stakeholder, after being notified by L. not to do so, pays over wagered money to P., on the agreement that if it should turn out that L. was the winner, P. would reimburse him, that such agreement is enforceable.

Reaffirmed and qualified in *Okerson v. Crittenden*, 62 Iowa 298, 17 N. W. 528, holding that where money is placed as a bet or wager in the hands of a stakeholder who is to pay it to the winner, that a demand of the money of the stakeholder by one of the parties, on

the ground that he is the winner, is not such a notice not to pay as will entitle the latter to recover against the former.

Reaffirmed and qualified in *Trenery v. Goudie*, 106 Iowa 694, 77 N. W. 467, holding that a notice by one bettor to the stakeholder for him not to pay over the money "until further notice," is insufficient to allow the former to recover of the latter who has paid it over.

Cross reference. See further on this question, annotations, note and cross references under *Shannon v. Baumer* (10 Iowa 210), Vol. I, p. 669.

STATE FOR USE, ETC. *v.* HEROD, 29 IOWA 123

1. Municipal Corporations—Street Railway Franchise—License Fee.—Where a street railway company is granted an exclusive right by a city to construct and operate a street railway over its streets for the carriage of passengers, but the franchise or ordinance granting it is silent as to the company's liability to pay a license fee under a pre-existing ordinance requiring the payment of such fee by all who use any hack, carriage, omnibus or other vehicle, for the purpose of carrying passengers, the railway company is liable for the payment of such license or fee, pp. 125, 126.

Reaffirmed and qualified in *City of Des Moines v. C. R. I. & P. R. R. Co.*, 41 Iowa 573, holding that where a city by ordinance, grants a railroad company a right to lay and maintain its track over and along a bridge and to operate it, subject to the regulations therein specified, the enumeration in the ordinance of what the grantee therein was required to do amounts to an implied negation that anything further was to be done, or paid for the privilege granted by the ordinance, and the railroad company to whom the grant was made, or its assignee, having expended its money in order to comply with the regulations and conditions of the ordinance granting the right, is entitled to enjoy the privilege granted without being subject to any further obligations or burdens.

Cited in *City of Burlington v. Putnam Ins. Co.*, 31 Iowa 106; *Town of Decorah v. Dunston Bros.*, 38 Iowa 99; *City of Ottumwa v. Zekind*, 95 Iowa 626, 628, 58 Am. St. Rep. 447, 29 L. R. A. 734, 64 N. W. 647, 648, holding—as does the present case in argument—that licenses are a part of the police regulations of a city, and should be charged for as such, and only to such extent as may reasonably compensate the city for issuing and enforcing the licenses, and for the care exercised by the city under its police authority over the particular person licensed: And holding, also, that the amount of the license fee or charge is to be considered, in determining whether the exaction is not really one of revenue or prohibition, instead of one of regulation, under the police power: That the charge made will be presumed to be reasonable, and within the authority conferred upon the municipality, unless the contrary appears upon the face of the ordinance, or is,

by evidence shown: That a municipality under authority given it to license has the right to impose such a charge as will cover, not only the necessary expenses of issuing it, but also the additional labor of officers, and other expenses imposed by the business, but nothing beyond this.

Cited in City of Burlington v. Bumgardner, 42 Iowa 674, the court holding—as does the present case in argument—that taxes cannot be imposed by a city under an authority to license; and holding, also, that the power to a city to *impose a tax* does not confer authority to license.

(Note.—There are other cases sustaining the text and its citing cases, but not citing the text.—Ed.)

DWYER v. GORAN, 29 IOWA 126

I. Res Adjudicata—When Former Judgment no Bar.—A former judgment is no bar to a subsequent action for the same relief as was the former action in which the judgment was rendered, when the latter action is based upon the facts of the former *and additional facts* necessary to a determination of the plaintiff's rights, and which transpired after the termination of the first action, and the entry of the judgment therein, p. 128.

Reaffirmed, explained and extended in Ross v. Dowden Mfg. Co., 147 Iowa 183, 123 N. W. 183, holding that all issues of fact or law which might have been adjudicated in a former action between the same parties are barred by a judgment therein; but that a former adjudication never affects *after-acquired* rights or claims which the parties had no opportunity to litigate.

Cross reference. See further on this question, annotations under Myers v. Johnson County (14 Iowa 47), Vol. II, p. 203.

ROBERTS v. HAMMON, 29 IOWA 128

I. Limitation of Actions—Part Payment Insufficient to Prevent Bar—New Promise Must be in Writing.—Under Sec. 2751 of the Code of 1860, part payment is insufficient to prevent a debt being barred by the statute of limitation; and a new promise must be in writing, signed by the party to be thereby charged, in order to have this effect, p. 129.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Rule 1 of Parsons v. Carey (28 Iowa 431), ante. p. 467.

STATE v. POLSON, 29 IOWA 133

I. Criminal Law—Trial of Indictment—Constitutional Rights of Accused—Waiver of by.—Upon the trial of an indictment for a felony, accused may waive his constitutional right to be confronted with his witnesses, and agree that the testimony of a witness given

upon the trial of one jointly indicted with him, and reduced to writing, may be read as evidence against him, pp. 134, 136.

Reaffirmed and explained in State v. Fooks, 65 Iowa 453, 454, 21 N. W. 774, holding that an accused person may agree that a written statement be read as the evidence of a witness against him upon the trial of an indictment.

Reaffirmed and explained in State v. Olds, 106 Iowa 114, 76 N. W. 647, holding that it is the right of a defendant in a criminal prosecution to be confronted on the trial by the witnesses against him, but it is a right which may be waived by him, and the testimony of the witnesses, in writing, be received.

Reaffirmed and explained in State v. Smith, 124 Iowa 338, 100 N. W. 42, holding that when a person permits illegal testimony to be given to the jury without objection, he cannot afterwards raise any claim of privilege on account of the admission: That the objection must be made as soon as discovered, and it is only where discovery follows the rendition of the verdict that defendant can be heard upon such ground to assail the verdict or the judgment entered thereon.

Reaffirmed and extended in Turney v. Barr, 75 Iowa 763, 38 N. W. 552, holding further that an accused person may waive his constitutional right to be confronted by his witnesses, and agree that the minutes of the grand jury be read as their evidence against him, upon the trial of an indictment—And see State v. Turney, 77 Iowa 272, 42 N. W. 191, reaffirming and extending the rule of the text, and holding that when the minutes of the grand jury are read as evidence against the accused upon the trial of an indictment, and without objection by him, he is held to have waived his constitutional right of being confronted with his witnesses, and cannot complain thereof upon appeal.

Reaffirmed and varied in State v. Kaufman, 51 Iowa 579, 582, 33 Am. Rep. 148, 2 N. W. 278, holding that an accused person may waive a statute or even a constitutional provision in his favor; and that he may, therefore, agree to a trial by jury of less than twelve—But see State v. Carman, 63 Iowa 133-135, (dissenting opinion citing the text), 50 Am. Rep. 741, 18 N. W. 693, the majority court holding that an accused person cannot—under Sec. 4350 of the Code of 1873—waive his constitutional right to a jury trial, and consent to being tried by the court.

Cited in State v. Hamilton, 32 Iowa 575; State v. Stickley, 41 Iowa 237; State v. McLaughlin, 44 Iowa 84, the court holding—as does the present case in argument—that a party cannot, even in a criminal case, allow illegal testimony to be given to the jury without objection, and afterwards make its introduction a ground for reversal.

Cited in State v. Hammer, 116 Iowa 289, 89 N. W. 1085, the court holding that where, during the argument upon the trial of an

indictment, the judge is temporarily absent from the court room, and the accused does not object thereto, it is no ground for reversal, in the absence of a showing of prejudice resulting to accused therefrom.

Cross references. See further on this question, annotations under Rule 1 of State v. Felter (25 Iowa 67), ante. p. 233; Rule 7 of State v. Reid (20 Iowa 413), Vol. II, p. 833.

McPHAIL & Co. v. HYATT, 29 IOWA 137

1. Pleading—Demurrer to Whole of Answer when one Count is Good.—A demurrer to the whole of an answer when one count thereof is good, must—under the Code of 1860—be overruled, pp. 139, 140.

Reaffirmed in Hine v. K. & D. M. R. R. Co., 42 Iowa 640; Little v. Sturgis, 127 Iowa 299, 300, 103 N. W. 206, holding the rule applicable under the codes of 1873, and 1897.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 4 of Hendershott v. Ping (24 Iowa 134), ante. p. 153.

2. Garnishment—Debt Assigned before Answer of Garnishee—Duty of Garnishee to Set up, if Known.—Where, before answer, the garnishee knows that the debt garnished has been assigned by the debtor, it is his (the garnishee's) duty to set up such fact as a defense, in his answer, failing which he will be liable to the assignee for the amount of the debt, p. 142.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Large v. Moore (17 Iowa 258), Vol. II, p. 525.

SHAFFER v. DEAN, 29 IOWA 144

1. Evidence—Competency of Witnesses—Adverse Party an Executor.—The wife of a party to an action may—under Secs. 3980, 3982 of the Code of 1860—testify as to facts transpiring during the life-time of a decedent, where the adverse party is an executor, pp. 145, 146.

Cited in Quick v. Brooks, Adm'r, 29 Iowa 487, the court holding that where the plaintiff gives his deposition in an action during the life-time of the defendant and relative to transactions between them, and thereafter, pending the action, the defendant dies, and his administrator is substituted as defendant, such deposition is inadmissible—The decedent, defendant, not having given his deposition therein before his death.

SLATTEN v. DES MOINES VALLEY R. R. CO., 29 IOWA 148, 4 AM. REP. 205

1. Municipal Corporations—Streets and Alleys—Railroad Right of Way over—Rights of Company—Liability in Damages to Abutting Lot Owners.—Under the statute law of this State a railroad company has a right to construct its railroad upon and over the streets and alleys of a city, upon obtaining authority from the city so to do; and the company will not be liable in damages to an abutting lot owner by reason of the construction thereof, unless it is wrongfully or negligently done.

A grant by a city of the right to a railroad company to build and operate its railroad bridge on a certain street, over and across a certain river, carries with it all the incidental rights and powers requisite to the efficacious and beneficial exercise and enjoyment thereof: And therefore such a railroad has the right, thereunder, to build its road upon the grade of the street, or any other grade agreed upon, and to build the bridge and all necessary and proper approaches thereto, pp. 153-155.

Reaffirmed as to first paragraph in City of Davenport v. Stevenson, 34 Iowa 228.

Cited in Gandy v. Ch. & N. W. R. R. Co., 30 Iowa 421, 6 Am. Rep. 682; McMillan v. Staples, 36 Iowa 533, the court holding that no liability to another can result from a lawful and proper use of one's own property—The cases, however, involving other questions.

Cited in Bradshaw v. Frazier, 113 Iowa 583, 86 Am. St. Rep. 394, 55 L. R. A. 258, 85 N. W. 753, not in point, but upon analogy.

Special cross reference. For further cases citing, sustaining, explaining, extending, etc., the text, and many others on the question, see annotations under City of Clinton v. City of Cedar Rapids & Mo. Riv. R. R. Co. (24 Iowa 455), ante. p. 213; Milburn v. City of Cedar Rapids (12 Iowa 246), Vol. II, p. 40.

2. Municipal Corporations—Streets and Alleys—Power to Change Grade.—A city has power to change the grade of a street or alley, and is not liable to an abutting lot owner for injury thereto resulting therefrom, p. 155.

Reaffirmed in City of Burlington v. Gilbert, 31 Iowa 369, 370, 7 Am. Rep. 143, holding that where a statute allows damages against the city for injuries resulting to realty by reason of the establishment of, or the changing of grades of a street, and, also, prescribes the manner of assessment thereof, it must be pursued, and an action will not lie for such injury.

Cross reference. See further on this question, annotations under Cotes & Patchin v. City of Davenport (9 Iowa 227), Vol. I, p. 568.

HUNT v. FREE, 29 IOWA 156

1. Courts—Circuit Court—Jurisdiction—Certiorari.—The circuit court is of limited jurisdiction, limited by the Act creating it. It has no jurisdiction of a proceeding of *Certiorari*.

Certiorari is a special proceeding, p. 157.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under *Thompson v. Reed* (29 Iowa 117), ante. p. 503.

CORBETT, ADMINISTRATOR v. BERRYHILL, 29 IOWA 157

1. Contracts—Construction of—Evidence—Intention of Parties, How Shown.—Courts should adopt the construction of a contract which is in accord with its terms, as understood by the parties. The intention of the parties will be followed, unless violence is thereby done to the rules of language or of law: And in arriving at such intention, the acts of the parties, and the circumstances surrounding the transaction and the situation of the parties will be considered, pp. 160, 161.

Reaffirmed in *Ditson v. Ditson*, 85 Iowa 283, 52 N. W. 204; *Agne v. Slitsinger*, 96 Iowa 186, 187, 36 L. R. A. 701, 64 N. W. 838; *Rapp v. Linebarger & Son*, 149 Iowa 434, 435.

Distinguished and narrowed in *Hall v. Horton*, 79 Iowa 356, 357, 44 N. W. 570, holding that the rule is inapplicable where the intention of the parties is clearly shown by the language they employ in a written contract or agreement.

Unreported citation, 60 N. W. 484; 128 N. W. 557.

Cross references. See further on this question, annotations and cross references under Rule 1 of *Karmuller v. Krotz*, (18 Iowa 352), Vol. II, p. 646; *Field v. Schricher* (14 Iowa 119), Vol. II, p. 214; *Rindskoff Bros. v. Barrett* (14 Iowa 101), Vol. II, p. 211; *McCraney's Ex'x v. Griffin* (13 Iowa 313), Vol. II, p. 156.

2. Lands—Sale of—Contract to Convey Certain Interest—Construction—Covenants.—Where one undertakes by contract to convey by good and sufficient deed the interest in realty conveyed to him by a certain deed, and without an express stipulation to warrant title, he is only required to convey his interest therein, pp. 164, 165.

Cited in *Younie, Brown & Martin v. Walrod*, 104 Iowa 479, 73 N. W. 1022, the court holding that it is a general rule that a contract to convey land by warranty deed, or by good and sufficient deed,—especially where the price to be paid is a fair equivalent for the property,—requires the conveyance of a good title.

MCDONALD v. CHICAGO & NORTHWESTERN R. R. CO., 29 IOWA 170
(Former Appeal, 26 Iowa 124.)

1. Contracts—Champerty—Attorney and Client.—Where a contract between an attorney and client merely provides for the former

receiving a contingent fee, and it does not provide for the payment of any expenses or costs of a litigation by the former, and does not prevent the client settling or compromising without the consent of the attorney, it is not void as champertous, p. 174.

Reaffirmed and explained in Jewel v. Neidy, 61 Iowa 300, 16 N. W. 141; Winslow v. Central Iowa Ry. Co., 71 Iowa 199, 32 N. W. 332; Dunham and Sloan v. Bentley, 103 Iowa 142, 72 N. W. 439, holding that a mere agreement between an attorney and client for the former to receive a contingent fee, is not champertous: That to constitute champerty, there must be an agreement on the part of the attorney to carry on the party's suit at his own expense, as well as for a share of the thing or money to be recovered.

Reaffirmed and explained in Wallace and Brown v. Ch. M. & St. P. Ry. Co., 112 Iowa 568, 84 N. W. 663, holding that when a contract between an attorney and client does not appear to be champertous, the fact that the attorney, during the pendency of the action, advanced certain money to pay expenses incident to the preparation and trial of the case, is not *alone* sufficient to prove that the contract was champertous.

Cross reference. See further on this question, annotations under Boardman & Brown v. Thompson (25 Iowa 487), ante. p. 289.

2. Damages — Appeal — Judgment Excessive — When not Ground for Reversal.—Where a judgment for damages for personal injuries occasioned by the negligence of defendant is sought to be reversed because the verdict and judgment is excessive, and the verdict and judgment is the second verdict for the plaintiff upon trials before two different judges, the second being larger than the first, there must be a very clear case of bias, prejudice, or departure from the evidence, in order to authorize reversal therefor, p. 175.

Reaffirmed in Rowell v. Williams, 29 Iowa 211, 217.

CHADBOURNE & FORSTER v. GILMAN, 29 IOWA 181

1. Mortgage on Land—Action to Foreclose—Venue—Action to Foreclose Several Mortgages on Several Parcels of Land Lying in Different Counties to Secure the Same Note.—Under Sec. 2795 of the Code of 1860, an action for the foreclosure of a mortgage of real property must be brought in the county in which the subject of the action, or some part thereof is situated.

So, where an action is brought to foreclose six mortgages on six separate tracts of land each lying in a different county, and the action is brought in the county wherein one of the tracts is situated, a motion to strike from the petition the allegations concerning the five tracts lying outside the county wherein the action is brought, must be sustained, p. 183.

Reaffirmed as to first paragraph in Iowa Loan & Trust Co. v. Day, 63 Iowa 460, 461, 19 N. W. 302; Orcut v. Hanson, Ex'x, 71 Iowa 517, 32 N. W. 482, under Sec. 2578 of the Code of 1873, corresponding to the section of the text.

Reaffirmed and explained in McDonald v. Second Nat'l Bank of Nashua, 106 Iowa 521-523, 16 N. W. 1012, 1013, holding that an action to foreclose a mortgage or other lien upon real estate must be brought in the county wherein it, or some part of it, is situated; but that such an action may be brought in such county, and another action at the same time be brought on the note secured by the mortgage in the county of the defendant's (mortgagor's) residence; or judgment may be obtained in the latter action, and thereafter an action to foreclose the mortgage be instituted in the county wherein the real estate, or some part of it, is situated: The court further holding, however, that where an action *in rem* as well as *in personam* is brought in the wrong county (such as actions to foreclose a mortgage), the defendant waives the error, unless before answer, he demands a change of venue to the proper county; but the rule is otherwise where the action is *in rem* only.

Cross references. See further on this question, annotations under Finnagan v. Manchester (12 Iowa 521), Vol. II, p. 87; Cole v. Connor (10 Iowa 299), Vol. I, p. 686.

NELSON v. EVERETT, 29 IOWA 184

1. Mortgage—Usury, what is not—Stipulation as to Reasonable Attorney's Fee in Case of Foreclosure, Valid—Action to Foreclose—Practice.—A stipulation in a mortgage that in case a foreclosure becomes necessary a reasonable attorney's fee shall be allowed the mortgagee, to be taxed as part of the costs, is valid. Such a condition does not render the transaction usurious.

And in an action to foreclose such a mortgage where the petition avers the stipulation as to the attorney's fee, and that it was part of the consideration for the mortgage, the court must hear proof as to what will be a reasonable fee, and allow it, to be taxed as part of the costs, pp. 184, 185.

Reaffirmed in Williams v. Meeker, 29 Iowa 295; Weatherby v. Smith, 30 Iowa 132, 6 Am. Rep. 663; McGill v. Griffin, 32 Iowa 446.

Reaffirmed and extended in Kuhn v. Myers, 37 Iowa 355; Musser v. Crum, 48 Iowa 54, holding further that a condition in a note or a bond for the payment of a reasonable attorney's fee in case of action thereon, is valid and not usurious.

(Note.—There are other cases, sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of Williams v. Meeker (29 Iowa 292), *Infra*, p. 530.

WELCH v. BURRIS, GUARDIAN, 29 IOWA 186

1. Parent and Child—Right of Mother to Claim for Past Support of Infant Children out of Pension Money of Deceased Husband.—The right of a mother to claim for the past support of her infant children out of a sum in the hands of their guardian derived from a bounty and pension by reason of the military service of the deceased husband and father in the United States Army, is not denied; but in order for the mother to obtain such sum for past support, she must make out a strong case entitling her thereto, and satisfactorily show why she did not make application for the allowance in advance, pp. 187, 188.

Reaffirmed and narrowed in Ellis v. Soper, 111 Iowa 638, 639, 82 N. W. 1044; *In re* Carter, 120 Iowa 217, 94 N. W. 489, holding that although a parent should obtain the sanction of the court before using the means of an infant child for its support, yet, where this is not done, that court will allow the parent for past support, where it appears that the latter's means were inadequate, or where not to so do would work hardship; and that this rule is more forcible in the case of a mother than of a father.

(Note.—See further, Latham v. Myers, 57 Iowa 519, 10 N. W. 924; Gerdes v. Weiser, 54 Iowa 591, 37 Am. Rep. 229, 7 N. W. 42; Heirs of Bradford v. Bodfish, 39 Iowa 681, a few important cases in this connection, not citing the text.—Ed.)

JONES & CO. v. MIDDLETON, 29 IOWA 188

1. Promissory Notes—Note Payable to Order Indorsed After Due—Demand and Notice of Non-Payment Required—Action on—Averments of Petition.—Where a note payable to order is transferred by indorsement after it is due, demand on the maker and notice of non-payment within a reasonable time thereafter, to the indorser, is necessary to hold the latter liable thereon.

And in an action by the holder of such note against the indorser, such demand and notice must be averred and proved, p. 189.

Reaffirmed in McKewer v. Kirtland, 33 Iowa 350.

Reaffirmed and extended in Pryor v. Bowman, 38 Iowa 92, 93, holding further that the rule is equally applicable to a note payable to bearer.

Cross reference. See further in this connection, the Negotiable Instrument Act, Code Supplement of 1907.

CHAPEL, ECKER & DOWLEY v. CLAPP, 29 IOWA 191

1. Fraudulent Conveyances—Participation in Fraud by Grantee—Effect.—If property be conveyed with the design on the part of the vendor, participated in by the vendee, to defraud his creditors, the vendee's title to the property will not be protected, notwithstanding he paid a sufficient consideration therefor, p. 194.

Reaffirmed in Williamson v. Wachenheim, 58 Iowa 280, 12 N. W. 302; McCreary v. Skinner, 83 Iowa 366, 49 N. W. 987; Mertens v. Welsing, 85 Iowa 511, 52 N. W. 363; Bruen v. Dunn, 87 Iowa 485, 54 N. W. 469; Liddle & Carter v. Allen, 90 Iowa 739, 740 (Abstract), 57 N. W. 605.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Wilson v. Horr (15 Iowa 489), Vol. II, p. 369.

CLARK v. WOLF, 29 IOWA 197

(Case involving same facts and questions and following this one, 29 Iowa 209.)

1. Res Adjudicata—Judgment Against County or Its Representatives Binding on Its Citizens and Tax Payers, when.—A judgment against a county or its representatives in an action involving a matter of general interest to the people thereof, or the fiscal interests or affairs of the county, is binding and conclusive upon all citizens and tax payers thereof, pp. 205-207.

Reaffirmed in Lyman v. Faris, 53 Iowa 500, 501, 5 N. W. 623; Cannon v. Nelson, 83 Iowa 246, 48 N. W. 1034; McConkie v. Remley, 119 Iowa 516, 517, 93 N. W. 507; Quinn v. Monona County, 140 Iowa 109, 117 N. W. 1102.

Reaffirmed in Lee v. Indep. Sch. Dist. of Iowa City, 149 Iowa 349, 350, 128 N. W. 534, applying the rule to a judgment against the officers of a school district on a matter of general interest to all the residents and tax payers thereof.

Reaffirmed and narrowed in Long v. Wilson, 119 Iowa 268, 269, 97 Am. St. Rep. 315, 60 L. R. A. 720, 93 N. W. 282, holding that although a judgment against a city on a matter of general interest, binds and concludes the people, citizens and tax payers as to such interest, yet it does not preclude a citizen or tax payer from instituting an action involving the same subject-matter, when he has a special interest therein, distinct from that of the city or the rest of the public: And hence holding that a judgment against a city in an action involving the obstructing of one of its streets, and in favor of the one who obstructed it, does not prevent an owner of land abutting thereon from suing to enjoin and abate such obstruction.

Cross references. See further in this connection, Henderson County v. Henderson Bridge Co., 105 Am. St. Rep. 213; Sauls v. Freeman, 5 Am. St. Rep. 502.

ROWELL v. WILLIAMS, 29 IOWA 210

1. Municipal Corporations—Defective or Dangerous Sidewalks and Streets—Liability of City for Personal Injuries Resulting from.—It is the duty of a city—under the Code of 1860—to keep sidewalks

and streets in a reasonable state of repair, so as to be reasonably safe both for those using them with vehicles or on foot, and to place necessary guards around places of danger, and for neglect of any such duty, the city will be liable in damages for personal injuries resulting from any such defective sidewalk or street, or dangerous place, pp. 212-214.

Reaffirmed in Collins v. City of Council Bluffs, 32 Iowa 327, 7 Am. Rep. 200; City of Keokuk v. Indep. Dist. of Keokuk, 53 Iowa 356, 357, 36 Am. Rep. 226, 5 N. W. 507.

Reaffirmed and explained in Hall v. Town of Manson, 99 Iowa 703, 34 L. R. A. 207, 68 N. W. 924, holding—as does the present case—that a city is liable for personal injuries resulting from a defective or dangerous place in a sidewalk or street, or which is so near thereto as to endanger those properly using it, when it fails to place reasonable guards from or warnings in relation thereto.

Reaffirmed and explained in Parmenter v. City of Marion, 113 Iowa 299, 300, 85 N. W. 91, 92, holding that under Sec. 753 of the Code of 1897, the duty of a city to keep streets in repair and free from nuisances is not discretionary, and a city is liable for damages resulting from its failure to obey the law—The case, however, turning upon the question of proximate and remote cause, the defect being held too remote.

Reaffirmed and explained in Earl v. Dlask, 126 Iowa 364, 106 Am. St. Rep. 361, 102 N. W. 141, holding that—under the Code of 1897—even an excavation entirely outside the street line, but so near thereto as to endanger the traveling public, is a nuisance, and the continuance or maintenance thereof renders the city liable for personal injuries resulting therefrom: And that as soon as a person gets upon the street, or upon what, from the nature of the construction, appears to be part of the street, he is ~~entitled~~^{held} to the protecting care of the city.

Reaffirmed and explained in Rea v. Sioux City, 127 Iowa 618, 103 N. W. 950, holding that a city is liable for dangers adjacent to, and not in, the sidewalk proper, which it permits to exist, to the peril of travelers.

Reaffirmed and explained in Wheeler v. City of Fort Dodge, 131 Iowa 575, 9 L. R. A. (New Series) 146, 108 N. W. 1060, holding that under Sec. 753 of the Code of 1897, the duty of a city to keep the streets free from nuisances is no less broad and imperative than is the duty to keep the surface of the street in repair, and, for failure to perform this statutory duty, whatever may be the rule of liability and non-liability at Common Law, the doctrine of this State is that the city is chargeable in damages to persons thereby injured: That the doctrine is that the vesting of this power carries with it, the affirmative duty or obligation to keep and maintain the public ways in reasonably safe condition and free from nuisances, and that for a vio-

lation of this duty an individual suffering injury therefrom may recover damages.

Reaffirmed and explained in Pace v. Webster City, 138 Iowa 110, 111, 115 N. W. 889, holding that under Sec. 753, of the Code of 1897, the imperative duty devolves upon a city to keep its streets in repair and free from nuisance, and it matters not who, in fact, creates the dangerous condition, the duty and liability of the city remains after it has notice thereof; and that the city cannot relieve itself of its duty or liability by delegating work to an independent contractor.

(Note.—There are many other cases sustaining the text and its annotations, but not citing the text.—Ed.)

Cross reference. See Rule 2 hereof, in this connection.

2. Municipal Corporations—Defective or Dangerous Condition of Sidewalks and Streets Caused by Private Individual—Liability of City.—Where a defective or dangerous condition of a street or sidewalk is caused by a private individual, the city is not liable for personal injuries caused thereby, unless it had notice thereof through its officers or agents, and thereafter failed, within a reasonable time, to guard against, or warn travelers thereof, p. 213.

Reaffirmed in Powers v. City of Council Bluffs, 50 Iowa 201.

Reaffirmed and explained in Doulon v. City of Clinton, 33 Iowa 399, holding that negligence must be affirmatively shown, and the mere existence of a defect in the sidewalk, is not enough to establish negligence on the part of the corporation: It must in some way be connected with the defect, either as having directly caused it, or having assented to its creation by another, or as having, with the knowledge of its existence, permitted it to remain.

Cross reference. See further on this question, annotations under Rule 1 hereof.

3. Trial—Verdict—Correction of Verdict by Jury under Instructions of Court—When not Reversible Error.—The correction of a verdict by a jury under directions or instructions of the court, when not prejudicial to the substantial rights of the unsuccessful party, will not be ground for reversal, p. 216.

Reaffirmed in Judge v. Jordan, 81 Iowa 525, 526, 46 N. W. 1079; Kinkead v. Peet, 136 Iowa 596, 597, 111 N. W. 51.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

4. Negligence—Damages—Excessive Damages, What not Sufficient for Reversal.—A verdict for seven thousand dollars against a city for personal injuries, whereby plaintiff suffered intense pain for many months, was put to great expense, and was rendered a cripple for life, and caused by the city's negligence, is not so excessive as to authorize a reversal for such cause, p. 217.

drain or channel, and is liable in damages to such lot owner for so doing.

Reaffirmed and explained in Wilbur v. City of Ft. Dodge, 120 Iowa 558, 95 N. W. 187, holding that a city may be liable for damages caused by the grading of a street, even though done in accordance with the provisions of a grade ordinance, if thereby the natural drainage is destroyed, and no adequate means is provided for the escape of surface water.

Reaffirmed and explained in Hume v. City of Des Moines, 146 Iowa 645-650, 1912 B. Am. & Eng. Ann. Cas., 904, 120 N. W. 1047, holding that a city has power to grade and gutter its streets, and is not liable for defective plans therefor, adopted by it; but it is liable in damages if it negligently carries out such plans, or if, without the adoption of any plans, it proceeds in a negligent manner to make embankments or fills, to the injury of an abutting or adjoining proprietor.

Distinguished and extended in Freburg v. City of Davenport, 63 Iowa 122, 123, 50 Am. Rep. 737, 18 N. W. 707, holding that a city has the right to grade its streets, and it is not liable in damages for failure to provide culverts or gutters adequate to keep surface water from adjoining lots which are below the established grade of the street—"particularly," says the court, "if the injury would not have occurred had the lots been filled up, so as to have been on a level with the street."

Unreported citation, 125 N. W. 854.

Cross references. See further on this question, annotations under Cotes & Patchin v. City of Davenport (9 Iowa 227), Vol. I, p. 568; see, also, in this connection, annotations under Livingston v. McDonald (21 Iowa 160), Vol. II, p. 886.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

BODWELL v. BRAGG & BRO., 29 IOWA 232

1. Appeal—Errors not Urged in Argument not Considered.—The Supreme Court will not—under the Code of 1860—consider errors in an action at law, not urged and relied on in argument of counsel, p. 234.

Special cross reference. For cases citing the text, and others on the question, see annotations under Clise v. Freeborn (29 Iowa 110), ante. p. 503.

MORTON v. COFFIN, 29 IOWA 235

1. Default Judgment—New Trial Ordered—Defense to be Shown—Practice.—When, under Sec. 3160 of the Code of 1860, a judgment by default on a promissory note is opened and a new trial is ordered, if upon the last trial a sufficient defense be not shown, the

first judgment will be confirmed and continued, without further proof on the part of plaintiff, p. 239.

Reaffirmed in Bowen v. Duffie, 66 Iowa 91, 92, 23 N. W. 278; Stanbrough v. Cook, 83 Iowa 710, 711, 49 N. W. 1012, under the Code of 1873, and on different kinds of judgments by default.

HUBBARD v. BARNES, 29 IOWA 239

1. Judgment Lien on Land—Judgment in District Court of one County—Filing Transcript with Clerk of District Court of another—Effect—Constructive Notice.—Where, under Secs. 3248, 3249 of the Code of 1860, the transcript of a judgment obtained in the district court of one county is filed with the clerk of such court of another, it operates as a lien upon the real estate of the judgment debtor which is situated in the latter county, and, also, as notice to subsequent purchasers thereof, pp. 241, 242.

Reaffirmed in Foreman v. Higham, 35 Iowa 384-386; McGinnis v. Edgell, 39 Iowa, 422, 423.

Cited in Drahos v. Kopesky, 132 Iowa 501, 109 N. W. 1023, not in point.

Cross references. See further on this question, annotations under Cummings v. Long (16 Iowa 41), Vol. II, p. 400; Rule 1 of Blaney v. Hanks (14 Iowa 400), Vol. II, p. 254; Seaton & Son v. Hamilton & Co. (10 Iowa 394), Vol. I, p. 711.

SWIFT v. NORTH MISSOURI R. R. Co., 29 IOWA 243

1. Railroads—Liability for Injuring or Killing Stock.—A railroad company is liable for injury to or the killing of stock on its track at a place where it has a right to but does not fence, although the stock has escaped from the inclosure of the owner, p. 244.

Special cross reference. For cases citing, sustaining and explaining the text, and many others on the question, see annotations under Hinman v. Ch. R. I. & P. R. R. Co. (28 Iowa 491), ante. p. 473.

CEDAR RAPIDS & MISSOURI R. R. Co. v. WOODBURY COUNTY, 29 IOWA 247

1. Taxation and Revenue—Railroads—Lands Granted by Congress in Aid of the Construction of—When Taxable.—Where a railroad company is granted a certain number of acres or tracts of land by the United States, and upon its completing a certain number of miles of railroad, but the Act of Congress does not identify or describe the land granted, and it cannot be definitely ascertained until a certificate issues therefor, it is not subject to taxation until the issuance thereof, pp. 248, 249.

Reaffirmed in Iowa R. R. Land Co. v. Story County, 36 Iowa 51.

Special cross reference. For further cases citing, sustaining, etc., the text, and many others on the question, see annotations under Iowa Homestead Co. v. Webster County (21 Iowa 221), Vol. II, p. 895.

BUNDY v. MCKEE, 29 IOWA 253

1. Attachment—Grounds for—Debtor About to Remove Property out of State, etc.—Insufficient Statement in Petition as to.—A petition for an attachment which avers that "defendant is in some manner about to dispose of his property without leaving sufficient remaining for the payment of his debts," is insufficient—under Sec. 3174 of the Code of 1860—in that it fails to aver that the disposition was about to be made *out of the State*, or the property was about to be *removed out of the State*, p. 254.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Mingus v. McLeod (25 Iowa 452), ante. p. 285.

2. Attachment—Amendment of Petition as to Ground set out in Rule 1—Insufficient Amendment.—Where a petition for an attachment fails to sufficiently aver the ground for the writ as set out in Rule 1 hereof, an amended petition must not only allege the ground as therein required, but must further aver that such ground and facts existed at the time the action was commenced, or the writ was issued, p. 254.

Reaffirmed and explained in Citizens' Nat'l Bank of Des Moines v. Converse, 105 Iowa 671, 75 N. W. 507, holding that under Sec. 3021 of the Code of 1873, the plaintiff in an attachment action may amend his petition, stating an *additional ground* therefor, the amendment stating that such ground existed at the time the writ was issued.

Cited with approval in Cawker City Bank v. Jennings, 89 Iowa 234, 56 N. W. 495, the case turning on other questions.

JENKINS v. BURLINGTON & MISSOURI RIVER R. R. Co., 29 IOWA 255

1. Conveyance of Land upon Condition Subsequent—Substantial Compliance Sufficient—Conveyance of Right of Way to Railroad upon Condition that it Establish Depot or Station.—A substantial compliance by the grantee of a condition subsequent in a conveyance of land, is all which is required to make the instrument valid.

So where land is conveyed to a railroad company as a right of way, upon condition that it make the town of C. a depot or station, the making of such town a station and the establishment of a depot one-fourth of a mile therefrom, is a substantial compliance with the condition, and makes the conveyance valid, p. 256.

Reaffirmed in Fitzgerald & Remick v. Britt, 43 Iowa 500; Whitney v. Ch. A. & N. Ry. Co., 133 Iowa 511, 110 N. W. 913, on different but similar facts.

Reaffirmed as to first paragraph in Meader v. Lowry, 45 Iowa 688, on different, but similar facts.

RUSSELL *v.* POTTAWATTAMIE COUNTY, 29 IOWA 256

1. Actions—Entry of Appearance by Attorney—Judgment by Default—Motion to Vacate for Want of Authority of Attorney Who Entered Appearance, when Overruled—Defense.—A motion to vacate or set aside a judgment by default entered upon the entry of defendant's appearance by attorney, for want of authority of the attorney to act, must be overruled, when such want of authority of the attorney is not clearly shown, as well as a good defense to the action, pp. 257, 258.

Reaffirmed in part in Dryden v. Wyllis, 51 Iowa 535, 1 N. W. 704, holding that under Sec. 3159 of the Code of 1873, a judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense to the action.

Reaffirmed in part in Reints v. Engle, 130 Iowa 728, 107 N. W. 947, holding that under Sec. 4049 of the Code of 1897, a judgment which is merely voidable or irregular, is not to be vacated until after a hearing of the alleged defense on its merits.

Unreported citation, 124 N. W. 360.

Cross reference. See further on this question, annotations under Rule 2 of *Miller v. Allbaugh* (24 Iowa 128), ante. p. 152.

LAKE *v.* REED, 29 IOWA 258, 4 AM. REP. 209

1. Negotiable Promissory Notes and Paper—Innocent Holder for Value and Before Maturity—Defenses of Maker Against.—Before the maker of a negotiable promissory note or paper can plead defenses he has, and latent infirmities thereof, against a holder for value who took before maturity, he must prove that the latter took with notice of such defenses or infirmities.

The right of a *bona fide* holder, for value, in the usual course of business, of negotiable paper, cannot be defeated by proof that he was negligent, and omitted to make inquiries which common prudence would have dictated, pp. 259, 260.

Reaffirmed in Lane v. Evans, 49 Iowa 157; *Richards v. Monroe*, 85 Iowa 364, 365, 39 Am. St. Rep. 301, 52 N. W. 341.

Reaffirmed in Sully v. Goldsmith, 32 Iowa 399, holding—as does the present case—that a *bona fide* holder for value, of a negotiable note is entitled to recover thereon against the maker, although it was obtained by fraud, where he took without notice thereof.

Reaffirmed and explained in Pond v. Waterloo Agricultural Works 50 Iowa 600, holding that to charge the holder of a negotiable promissory note with notice of infirmities, he must have been guilty of something more than mere negligence in taking the note.

Reaffirmed and explained in Lehman v. Press, 106 Iowa 393, 76 N. W. 819, holding that because of the commercial character of negotiable paper, and the need of sustaining its negotiable quality, it cannot be impeached in the hands of a holder for value, and before maturity, unless acquired under circumstances such as indicate actual fraud by the party taking it: And that in an action by such holder, in order to defeat his recovery, he must be shown, by direct or circumstantial evidence, to have taken the paper with knowledge or notice of its infirmities, or the circumstances must be such as indicate willful neglect to inquire, or such gross carelessness in failing to do so, when inquiry would have led to such knowledge, as shall establish bad faith.

Reaffirmed and extended in Leland v. Parriott, 35 Iowa 455, 456, holding further that where, after a negotiable note has been indorsed by the payee, a subsequent holder indorses on the back thereof, an agreement not to sell or dispose of it, such indorsement does not affect its negotiability, nor preclude a later holder, for value, from recovering thereon against the maker.

Reaffirmed and extended in Cook v. Weirman, 51 Iowa 564, 2 N. W. 389, holding further that where a negotiable note is valid on its face, it will be protected in the hands of a holder for value, who takes before maturity, from all infirmities and defenses, unless the holder enforcing it was guilty of actual bad faith in taking it: And that even gross negligence on the part of such holder, in failing to ascertain infirmities and defenses, will not defeat recovery.

Reaffirmed and narrowed in Merrill v. Hole, 85 Iowa 70, 52 N. W. 5, holding that the circumstances coming to the knowledge of the purchaser of a note, must be such as to require that he shall, in good faith inquire as to its validity, and it is only where the failure to inquire, evinces actual bad faith that it is sufficient to charge him with notice.

Cited in Stoddard v. Burton, 41 Iowa 587, the court holding that mere suspicion that a person in possession of a note payable to bearer may not be the owner, will not exonerate the maker from payment; but that in order to enable the maker to refuse to pay such a note to the holder, there must be circumstances amounting to clear proof that he is a fraudulent holder; and that a payment by the maker to the holder, in the absence of such circumstances or proof, exonerates him, and amounts to a satisfaction of the note.

Cited in Hoffman v. Leibfarth, 51 Iowa 711, 712 (abstract), 2 N. W. 519, the court holding that in an action by an indorsee of a promissory note indorsed before maturity, the facts that the plaintiff had been in the employ, as cashier, of payees who were dealers in intoxicating liquors in this State, and that the makers of the note had purchased such liquors of the payees several times during the period of two years next preceding the execution thereof, which purchases were charged on the books of the payees, were sufficient to prove knowledge of the plaintiff (indorsee) of illegal consideration thereof.

Cross reference. See further on this question, annotations and cross references under *Gage v. Sharp* (24 Iowa 15), ante. p. 140.

JEURE *v.* PERKINS, 29 IOWA 262

1. Appeal—Demurrer Assigning Several Causes—Practice in Supreme Court.—Where a demurrer, assigning several causes, is sustained as to one of them and overruled as to the others, then on appeal to the Supreme Court the judgment on the demurrer will be affirmed, if it should have been sustained for any of the causes assigned, although it may have been erroneous to sustain it on the ground ruled by the court below, p. 263.

Cited in *Bank of Reinbeck v. Brown*, sheriff, 76 Iowa 698, 39 N. W. 525, turning on other questions.

(Note.—See further, *Wetmore v. Mellinger*, 64 Iowa 741, 52 Am. Rep. 465, 18 N. W. 870; *Dist. Township of Clay v. Indep. Dist. of Buchanan*, 63 Iowa 189, 18 N. W. 859; *Childs v. Dobbins*, 61 Iowa 114, 15 N. W. 849, some important cases on this question, not citing the text.—Ed.)

STATE, *EX REL.* *v.* INDEPENDENT SCHOOL DISTRICT OF CARBONDALE, 29 IOWA 264

1. Schools—Organization of Independent District of Less than Two Hundred Inhabitants—Quo Warranto.—Chap. 143, Sec. 9, Acts of 1866 (11th General Assembly) requires that an independent school district organized thereunder shall contain at least two hundred inhabitants; and when such a district is organized thereunder, containing less than such number of inhabitants, the validity of the organization thereof may be tested by information in the nature of *Quo Warranto*, p. 265.

Reaffirmed in *State ex rel. Harmis v. Alexander*, 129 Iowa 541, 105 N. W. 1022, holding that *Quo Warranto* is the proper remedy to test the legality of proceedings for the organization of an independent school district.

Cited in *State ex rel. White v. Barker et al.*, 116 Iowa 99, 93 Am. St. Rep. 222, 57 L. R. A. 244, 89 N. W. 205, the court holding that under Sec. 4316 of the Code of 1897, if the county attorney, on demand, neglects or refuses to commence *Quo Warranto* proceedings to test the legality or constitutionality of an office, or the validity of the appointment of an officer therefor, any citizen having an interest, may commence and prosecute the proceedings.

Unreported citation, 136 N. W. 938.

Cross references. See further in this connection, annotations under Rule 3 of *Cochran v. McCleary*, mayor (22 Iowa 75), ante. p. 8; *Fort Dodge City School Dist. v. Dist. Township of Waukaha* (17 Iowa 85), Vol. II, p. 499.

STATE v. KIMBALL, 29 IOWA 267

1. Criminal Law—Grand Jury—Investigation of Offense by—Presence of Unauthorized Person—When no Cause for Setting Aside Indictment.—The presence of the bailiff in the grand jury room, while it is investigating an offense, but not while the grand jury is deliberating thereon, is no ground for setting aside the indictment, under Secs. 4636 and 4691 of the Code of 1860, p. 268.

Reaffirmed and extended in State v. Wood, 112 Iowa 486, 84 N. W. 504, holding further that the presence of one, who was required to go before the grand jury as a witness, while another witness was giving testimony, is not sufficient ground for setting aside the indictment, where no other showing of prejudice to defendant is made.

Reaffirmed and varied in State v. Tyler, 122 Iowa 130, 97 N. W. 985, holding that the examination of witnesses before the grand jury by a county attorney *pro tem.* is not cause for setting aside an indictment.

Distinguished in State v. Will, 97 Iowa 64-66, 65 N. W. 1012, holding that when the district judge goes to the grand jury room while they are deliberating upon an offense against accused, and directs them to indict him, such facts are sufficient ground for setting aside or quashing the indictment: And that such facts may be proved by the affidavits of grand jurors.

STATE v. HART, 29 IOWA 268

1. Grand Jury—Challenge to Panel—When to be Made.—Under Secs. 4611-4613, 4693 of the Code of 1860, a defendant who is in custody and held to answer, may enter a challenge to the grand jury before it is sworn, but not afterward, p. 270.

Reaffirmed in State v. Belvel, 89 Iowa 409, 27 L. R. A. 846, 56 N. W. 547; State v. Pierce, 90 Iowa 509, 58 N. W. 892, under the Code of 1873.

Cross references. See further on this question, annotations under Rule 7 of State v. Reid (20 Iowa 413), Vol. II, p. 833; State v. Howard and Cress (10 Iowa 101), Vol. I, p. 650.

BARLOW v. CHICAGO, ROCK ISLAND & PACIFIC R. R. CO., 29 IOWA 276

1. Deeds—Sufficiency of Description in—Construction of—Railroad Right of Way.—In construing a deed, to arrive at the intention of the parties and in order to uphold the instrument, the court will take into consideration the situation of the parties to the deed at the time it was made, and the property which is the subject-matter of their contract, and the intention and purpose of the parties in making it, together with its entire language. Where a deed is susceptible of two constructions, one of which will render it void for uncertainty of

description and the other will render it valid, the latter will be adopted by the court, although it may not be the most natural or reasonable, upon the language alone.

So the following description and language in a deed to a railroad company is construed to be valid, not void for uncertainty, and to convey a right of way to the company, and not a fee simple title, as if construed as a conveyance of the latter title it might be void for uncertainty, to-wit:

"A strip of land through the southwest quarter of section number six, in township number seventy-eight, north of range number twenty-three, west of the fifth principal meridian, one hundred feet in width being fifty feet on either side of the center line of said road of said company, as located or to be located by the engineers of the said railroad company, for the construction of the second division of said railroad from Iowa City, in Johnson County, to Fort Des Moines, in Polk County, Iowa; to have and to hold the same unto the said railroad company forever; provided that in case said railroad company do not construct their road through said tract, or shall, after construction, permanently abandon the route through said tract of land, the same shall revert to and become the property of the grantors, their heirs or assigns," pp. 278-280.

Reaffirmed, explained and varied in O. C. F. & St. P. Ry. Co. v. McWilliams, 71 Iowa 166-169, 32 N. W. 317, holding that the following language in a contract between a land owner and a railroad company conveys a right of way and not a fee simple title, to-wit:

"In consideration of one dollar in hand paid, and a further consideration of \$120.00, to be paid before work is commenced, and of the location and construction of the Ottumwa, Cedar Falls & St. Paul Railroad, and the benefits, to be derived therefrom, I do hereby release to said railroad company the right of way through the land owned by me in sections 22 and 28, Tp. 79, R. 13, Poweshiek County, Iowa, together with all necessary width for embankment, excavations, slopes, spoilbanks and borrowing-pits; and I, for myself, and for my heirs, executors and assigns, do hereby covenant and agree to and with said railroad company to convey, metes and bounds, at any time the said railroad company shall call for the same, by deed in fee simple, a strip of ground not less than fifty feet in width on each side of the center of the track of said railroad, over and through the above described land."

Reaffirmed, explained and varied as to first paragraph in Maxwell v. McCall, 145 Iowa 688, 691, 692, 124 N. W. 762, holding that the following language in a deed conveys an easement or right of way and not a fee simple title, and is valid, without the wife of the grantor signing or concurring therein although the land is homestead of the grantor, to-wit:

"Know all men that I, J. F. McC., in consideration of the sum of \$100 in hand paid by J. M. M., do hereby grant, bargain, sell and con-

vey unto the said J. M. M., his heirs and assigns forever, the following described real estate situated in Washington County, Iowa, to-wit: A strip of land for road purposes, forty feet in width described as follows, to-wit: [Description], excepting and reserving the use and possession thereof so long as the grantor shall live, then full possession shall pass to the grantee. And the said grantor hereby warrants the title to said premises against the lawful claims of all persons whomsoever."

2. Railroad Company—Conveyance to of Right of Way—Right of Way "an interest" in Land.—A deed to a railroad company conveying a right of way over land, conveys and passes *an interest* therein, p. 280.

Reaffirmed in Spencer v. Wabash R. R. Co., 132 Iowa 132, 133, 109 N. W. 454.

Cited in Clark v. Wabash R. R. Co., 132 Iowa 14, 109 N. W. 310, the court holding that a right of way of a railroad company is an easement, and can only be acquired by grant, either from the owner or from the State, through the exercise of the right of eminent domain, or by prescription.

3. Lands—Easements—Easement Acquired by Deed—Limitation of Actions—Mere Non-user Does Not Affect or Bar.—Where an easement is acquired by deed, the mere non-user thereof by its owner, unaccompanied by use adverse to his, does not affect the rights of the former, or bar an action for its recovery under the statute of limitation—Code of 1860, p. 281.

Reaffirmed in Noll v. D. B. & M. R. R. Co., 32 Iowa 70, 71.

Reaffirmed in Canning & Co. v. B. C. R. & N. Ry. Co., 120 Iowa 729, 95 N. W. 197, a case wherein a railroad company was held barred to claim a portion of its right of way which had been adversely held by another for twenty-five years without objection on the part of the company.

Reaffirmed and explained in Watkins v. Iowa Central Ry. Co., 123 Iowa 399, 98 N. W. 913, holding that Sec. 2015 of the Code of 1860 (law of the text), does not apply to an easement acquired by express grant, and that failure to use it, even when accompanied by possession of the original owner, in the absence of any act of his preventing the use, will not defeat the easement.

Reaffirmed and extended in Davies v. Huebner, 45 Iowa 576, holding further that where a highway is established by legal proceedings, mere non-user for the statutory period of ten years, not accompanied by any adverse use, does not bar or affect the rights of the public.

Reaffirmed and extended in Slocumb v. C. B. & Q. R. R. Co., 57 Iowa 679, 680, 11 N. W. 642, holding further that there is no difference in the application of the statute of limitation in the case of a party affected with notice of the acquisition of an easement by an irrevocable

parol license, and the application of such statute to an easement acquired by grant or deed.

Reaffirmed and varied in C. R. I. & P. R. R. Co. v. City of Council Bluffs, 109 Iowa 431, 80 N. W. 567, holding that where a railroad company recognizes and adopts the dedication of a street and crossing as made by the original proprietor, mere non-use thereof will not defeat the right of the city to open and replank the crossing, after the company has wrongfully destroyed it.

Distinguished in Ball v. Keokuk & N. W. Ry. Co., 62 Iowa 754, 755, 16 N. W. 594, holding that where the owner of land contracts in writing to convey a right of way to a railroad company, upon demand, the failure of the company to demand the conveyance for the statutory period of ten years, bars its right of recovery.

Distinguished and narrowed in McClain v. Ch. R. I. & P. Ry. Co., 90 Iowa 647-649, 57 N. W. 594, holding that in case of the right of way or road-bed of a railroad company, Sec. 1260 of the Code of 1873 provides that "if said road-bed or right of way, or any part thereof, shall not be used or operated for a period of eight years,* * * the land and title thereto shall revert to the owner of the section, subdivision, tract, or lot from which it was taken"; and that under this statute mere non-user for eight years constitutes abandonment, regardless of the intention of the company: And holding, also, that irrespective of this statute a grant or deed to a railroad of a right of way may provide that in case the grantee or railroad company shall at any time cease permanently to use the right of way for the purposes for which it is conveyed, the title thereto shall revert to the grantor or his heirs or privies; and that in this last case there was a permanent non-user thereof by the company, if the non-user was permanent, that is, without an intention to resume the use, and this would constitute abandonment, without regard to the length of time the right of way had not been used.

CITY OF INDIANOLA v. JONES, 29 IOWA 282

1. Municipal Corporations—Parol Contract by Agent.—A municipal corporation may contract by parol through agents, the same as individuals; and Sec. 1134 of the Code of 1860, providing that "on the passage or adoption of every by-law or ordinance, and every resolution or order to enter into a contract by any council of any municipal corporation, the yeas and nays shall be called and recorded," does not affect this rule, p. 283.

Reaffirmed and extended in Duncombe v. City of Ft. Dodge, 38 Iowa 283, holding further that a municipal corporation is liable upon an implied promise for work done, and which was paid for by the party suing therefor.

Reaffirmed and extended in Griggs v. Kimball, 42 Iowa 516, holding further that Sec. 321 of the Code of 1873, requiring a recorded

dee's land thereunder, or the latter conveys his land to the former pursuant thereto, it brings the case within the exception, and the vendee may prove the contract by parol evidence, p. 299.

Reaffirmed in Fisher v. Koontz, 110 Iowa 503, 80 N. W. 552, under Sec. 4626 of the Code of 1897, corresponding to the section of the text—the case, however, turning upon another question.

Reaffirmed and explained in Devin v. Eagleson, 79 Iowa 273, 274, 44 N. W. 546, holding that the "purchase money" mentioned in Sec. 3665 of the Code of 1873, corresponding to the section of the text, allowing parol evidence to establish a contract for the sale or conveyance of land, where part thereof is paid to the vendor, means the consideration: And that a verbal agreement to execute a mortgage on land in consideration of a conveyance of other land, will be upheld and enforced in equity as against the party agreeing to execute the mortgage, or his assignee, when the land was conveyed pursuant to the agreement.

Reaffirmed and explained as to first and second paragraph in Daily v. Minnick, 117 Iowa 569, 60 L. R. A. 840, 91 N. W. 915, holding that under Sec. 4626 of the Code of 1897, corresponding to the section of the text, the "purchase money" means *the consideration received by the vendor, in whatever form it may exist.*

Reaffirmed and extended in Stem v. Nysonger, 69 Iowa 513-515, 29 N. W. 434, holding further that a parol contract whereby a party agrees with an infant that the former will convey to the latter a certain number of acres of land, if the infant will work for him until he arrives at the age of twenty-one years, will be specifically enforced in equity, upon compliance therewith by the infant, such labor constituting a payment of the "purchase money," under Sec. 3665 of the Code of 1873, corresponding to the section of the text: But holding, however, that one who seeks, in a court of equity, to enforce an alleged parol agreement to convey real estate, must establish the contract by clear and unequivocal testimony.

Reaffirmed and extended in Harlan v. Harlan, 102 Iowa 703, 72 N. W. 287, holding further that—under Sec. 3665 of the Code of 1873—where a party verbally agrees to convey a tract of land to another, if the latter will care for the former's brother until his death, that upon the latter so caring for the brother and at his death, the contract will be specifically enforced in equity.

2. Deeds—Name of Grantee Left Blank by Grantor—Filling in by Grantee—Ratification by Grantor—Validity of Deed.—Where a deed is executed with the name of the grantee blank, because the grantor does not know it, and it is delivered to the grantee intended, who fills in his name, and the grantor thereafter ratifies and claims the benefit of the delivery of the perfected deed, it is valid, p. 301.

Special cross reference. For cases citing and extending the rule of the text, and others on the question, see annotations under Rule 2 of *Simms v. Hervey* (19 Iowa 373), Vol. II, p. 727.

3. Vendor and Purchaser—Contract to Convey Real Estate—Breach of—Action for Damages—Measure of.—In an action for breach of contract to convey real estate, the measure of damages is the value of the realty which, by the contract, was to have been conveyed by the defendant (vendor), p. 301.

Reaffirmed in *Stewart v. Jack*, 78 Iowa 156, 42 N. W. 634.

Reaffirmed, explained and qualified in *Yokom v. McBride*, 56 Iowa 142, 8 N. W. 796, holding that in the action set out in the text, the value of the land is the measure of damages when it exceeds the value of the consideration, and the conveyance is not made through the fault of defendant: That if defendant is in fault, plaintiff is entitled to recover substantial damages, which would be the value of the land, if it be greater than the value of the consideration paid therefor: But if the value of the land be less than the consideration paid, the plaintiff's measure of damages will be the value of the consideration.

Cross references. See further on this question, annotations under *Likes v. Baer* (8 Iowa 368), Vol. I, p. 519; and see, also, in this connection, annotations under *Gates v. Reynolds* (13 Iowa 1), Vol. II, p. 107.

McNITT v. HELM, 29 IOWA 302

(Later Appeal, 33 Iowa 342.)

1. Promissory Note Executed by One for Another's Debt—Statute of Limitation—Testimony of Defendant Showing Debt Still Just and Subsisting.—Where, in an action on a promissory note, it appears from the testimony of the defendant that he executed it for property purchased and received by his brother, and that it has not been paid, the debt still "justly subsists" against him, and the action is not barred by the statute of limitation, under Sec. 2742 of the Code of 1860, pp. 303, 304.

Cited in *Collins v. Bane*, 34 Iowa 391, the court holding that one upon whose credit a debt is contracted by another, is a principal to the creditor, and his new promise or admission, made as required by statute, prevents the bar of the statute of limitation, or renews the debt, although it may be barred thereby as against the other.

LAUMAN v. DES MOINES COUNTY, 29 IOWA 310

1. Pleading—Amended or Substituted Answer—Issues to be Determined from.—Where defendant files an amended answer, or one which is a substitute for the original, the court will look to it *alone* to ascertain and determine the issues, p. 311.

Cited in *In re Estate of McMurray*, 107 Iowa 650 78 N. W. 692, the case turning on other questions.

Cited in Thayer v. Smoky Hollow Coal Co., 129 Iowa 553, 105 N. W. 1025, the court holding that where a party files a substitute to a pleading he may, thereafter, by leave of court, withdraw it, and file an amendment to the original pleading, setting up additional facts supporting his cause of action or defense.

Cross reference. See further on this question, annotations and note under Rule 1 of Bates v. Kemp (12 Iowa 99), Vol. II, p. 18.

2. Taxes—Recovery from County of Taxes Paid, which are Void, Illegal, or Erroneous.—When taxes which are void, illegal, or erroneous are paid to the county treasurer by a tax payer, they may—under Sec. 762 of the Code of 1860—be recovered; and where the county board of supervisors refuses to order the treasurer to refund them, the tax payer may sue the county therefor, pp. 313-315.

Reaffirmed in Isbell v. Crawford County, 40 Iowa 103; Richards v. Wapello County, 48 Iowa 510; Dickey v. Polk County, 58 Iowa 289-292, 12 N. W. 292, under Sec. 870 of the Code of 1873, corresponding to the section of the text.

Reaffirmed and explained in Dickey v. Polk County, 58 Iowa 291, 292, 12 N. W. 292, holding that the rule applies to illegal or erroneous taxes exacted and paid for bridge purposes.

Reaffirmed and extended in Tallant v. City of Burlington, 39 Iowa 548, 549, holding further that where a city has, by ordinance, adopted and enacted the section of the text, the rule is applicable to a tax thereafter imposed without authority, for macadamizing and curbing streets; and that a lot owner or tax payer, who pays such a tax, under protest, may recover it from the city.

Reaffirmed and extended in Brownlee v. Marion County, 53 Iowa 489, 5 N. W. 612, holding further that where land is sold under a void assessment, it being assessed and sold as the property of one having no interest therein, the owner thereof may—under Sec. 870 of the Code of 1873, corresponding to the section of the text—recover of the county the amount which he had to pay, to redeem from such illegal and void sale; and that in such case, the owner is not bound to apply to the county board of supervisors for relief, before bringing his action therefor.

Reaffirmed and extended in Thomas v. City of Burlington, 69 Iowa 141-143, 28 N. W. 481, holding further that when the owner of real estate pays, under protest, city taxes levied without authority, he can recover them from the city; and that the constitutional limitation as to the amount for which a city may become indebted, has no application, such claim not being a "debt" within its meaning.

Distinguished and narrowed in Morris v. Sioux County, 42 Iowa 417, 418, holding that where real estate is sold for taxes after they have been paid by the owner, the sale is void, the owner is under no duty to redeem therefrom, and he cannot recover from the county, the amount which he paid to redeem therefrom.

Distinguished and narrowed in Butler v. Board of Supervisors of Fayette County, 46 Iowa 328; Barnes v. Marshall County, 56 Iowa 22, 23, 41 Am. Rep. 77, 8 N. W. 678; Dickey v. Polk County, 58 Iowa 291, 292, 12 N. W. 292; Stone v. Woodbury County, 51 Iowa 523, 524, 1 N. W. 747; Iowa R. R. Land Co. v. Woodbury County, 64 Iowa 215, 216, 19 N. W. 917, holding that the rule is inapplicable to special taxes paid, such as taxes in aid of the construction of a railroad, those for road or school districts, etc.; as in such cases, the county, by its treasurer, only receives and disburses them as a trust fund; unless the fund or enough to satisfy the taxes paid and sued for, has not been disbursed, in which latter case the county will be liable to pay them out of such undisbursed fund, but no further.

Distinguished and narrowed in Slimmer v. Chickasaw County, 140 Iowa 453, 455, 17 Am. & Eng. Ann. Cas. 1028, 118 N. W. 780, holding that where one voluntarily furnishes a list of his property for assessment, and pays the taxes so assessed, he cannot thereafter sue the county therefor, but is estopped by his acts from claiming that the property is not subject to taxation: And that Sec. 1417 of the Code of 1897, corresponding to the section of the text, does not apply in such a case.

Cross reference. See further in this connection, annotations under Macklott v. City of Davenport (17 Iowa 379), Vol. II, p. 541.

STATE v. BELL, 29 IOWA 316

1. Criminal Law—Drunkennes as Defense, when—Burglary—Intent to Commit Larceny—Evidence—Drunkennes of Accused.— If an offense or crime is only committed when the act is joined with the intent, then if it be committed by one who is too drunk to entertain the intent, it is not complete, and the accused is entitled to an acquittal.

This is the rule upon the trial of an indictment for burglary with intent to commit larceny, under Sec. 4232 of the Code of 1860, pp. 317-319.

Reaffirmed in State v. Maxwell, 42 Iowa 213.

Reaffirmed as to first paragraph in State v. Pasnau, 118 Iowa 504, 92 N. W. 683; State v. Cather, 121 Iowa 110, 96 N. W. 723; State v. Williams, 122 Iowa 124, 97 N. W. 996.

(Note.—See further, State v. Dorland, 103 Iowa 168, 72 N. W. 492; State v. Donovan, 61 Iowa 369, 16 N. W. 206, important cases, sustaining, but not citing, the text.—Ed.)

BROWN v. CREGO, TREASURER, 29 IOWA 321

(Later Appeal, 32 Iowa 498.)

1. Circuit Court—Jurisdiction—Mandamus—Mandamus Proceeding is a "Civil Action at Law."—The circuit court has concurrent jurisdiction with the district court of a mandamus proceeding,

under Sec. 4, Acts of 1868 (12th General Assembly), such proceeding being a "civil action at law" as mentioned therein, pp. 321-323.

Cited in Ford v. City of Manchester, 136 Iowa 216, 113 N. W. 848, the court holding that an action to recover upon a contract, is essentially an action at law, and the demand for a writ of mandamus can have no effect to convert it into an action in equity; because mandamus is, itself, a law remedy, and an action or proceeding in which such remedy is sought is a legal, and not an equitable proceeding.

Cited in Windsor v. Polk County, 115 Iowa 740, 87 N. W. 704, the case turning upon the right of a private individual or tax payer, to institute a mandamus proceeding to compel public officers to do acts which it is their imperative duty to perform.

SIMONS & Co. v. COOK, 29 IOWA 324

1. **Foreign Judgment—United States Revenue Stamp not Required to Certificates of Authentication or Transcript.**—No United States Revenue Stamp is required, by the Act of Congress in force in 1870, to be affixed to a transcript of or the certificates of authentication of a foreign judgment, p. 326.

Reaffirmed in Walker v. Sleight, 30 Iowa 326, 327.

ROBB v. McDONALD, 29 IOWA 330, 4 AM. REP. 211

1. **Contempt—Habeas Corpus.**—*Habeas Corpus* cannot issue upon petition of one imprisoned for contempt of court, and to review the validity and regularity of the contempt proceedings, unless they were so grossly defective as to render them and the judgment of commitment void, pp. 333, 334.

Reaffirmed in State ex rel. Whitcomb v. Seaton, sheriff, 61 Iowa 566, 567, (cited in dissenting opinion, 569, 571), 16 N. W. 739, holding, also,—as does the present case—that a judge or justice has power to punish for contempt for disobedience of a subpoena or order which he has authority to issue or make—And to the same effect is Lutz v. Aylesworth, 66 Iowa 633, 24 N. W. 247, citing the text.

Distinguished and narrowed in Dudley v. McCord, 65 Iowa 673, 674, 22 N. W. 921, holding that *habeas corpus* lies in favor of one imprisoned for contempt in refusing to obey a subpoena and give an affidavit on a matter concerning which he was not required to make an affidavit, and it not being in an action or other proceeding.

BOARDMAN v. HAYNE, 29 IOWA 339

1. **School Districts—Order or Warrant Drawn without Authority—Liability of Officers Issuing.**—Where an order or warrant of a school district is drawn by the officers thereof, without legal authority so to do, it is void, even in the hands of an innocent holder for value: Nor are such officers liable individually to the latter by reason of such transaction, pp. 342-346.

Special cross reference. For cases citing and distinguishing the text, and others, see annotations under Rule 3 of Dubuque Female College v. District Township of Dubuque (13 Iowa 555), Vol. II, p. 186.

Cross reference. See further on this question, annotations and cross references under Taylor v. District Township of Wayne (25 Iowa 447), ante. p. 283.

HUSTON, EXECUTOR v. HUSTON, 29 IOWA 347

(Later Appeal, 37 Iowa 669.)

1. Wills—Construction of—Devise upon Condition that Devisee Pay Debts of Testator.—Where a testator bequeaths and devises a large amount of real and personal property and certain choses in action, among which is his "home place" and a certain named judgment, to his brother, and then adds that the legatee or devisee (naming him) is "to settle and pay all my (the testator's) just debts and demands, which my home place and the judgment (named) will pay all I am indebted and put a good large tombstone, etc.," the Will will be construed that the bequest and devise is made on condition that the legatee or devisee shall pay *all the just debts* of the testator, and not only those which the "home place" and the named judgment will satisfy, pp. 350, 351.

Unreported Citation, 133 N. W. 1073.

PHOENIX v. LAMB, 29 IOWA 352

1. Trial—Refusal to Submit Question for Special Finding by Jury—When not Cause for Reversal upon Appeal.—Because the trial court refused to submit to the jury for a special finding, a question which did not involve an ultimate fact, is not ground for reversal upon appeal; especially where the jury could not well answer the question, without great danger of becoming confused as to or of misapprehending the issue, p. 355.

Reaffirmed in Cawker City Bank v. Jennings, 89 Iowa 236, 56 N. W. 495; O'Leary Bros. v. German-American Ins. Co., 100 Iowa 399, 69 N. W. 689, Engval, Adm'r v. Des Moines City Ry. Co., 145 Iowa 568, 121 N. W. 15.

Reaffirmed and explained in Read & Traversy v. State Ins. Co., 103 Iowa 319, 64 Am. St. Rep. 180, 72 N. W. 668, holding that in order for a question for a special finding to be submitted to the jury, the fact to be found must be one inhering in and necessary to determine in arriving at the general verdict; and the method or elements considered in reaching the ultimate facts cannot be called for by special interrogatories.

Reaffirmed, explained and extended in Thomas v. Schee, 80 Iowa 243, 45 N. W. 541, holding that it is not error to refuse to submit to the jury particular questions, not ultimate in their nature, or which could not well be considered or answered, without danger of

confusion and misapprehension: And holding further that the court cannot be required to propound to the jury interrogatories which call for the finding of facts which are not necessarily determinative of the case.

Unreported citation, 136 N. W. 324.

(Note.—There are numerous cases, under the various codes, sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Rules 3 and 4 of *Bonham v. Iowa Central Ins. Co.* (25 Iowa 328), ante. p. 271.

2. Trial—General and Special Verdicts—When Special Prevails over General—When Judgment on General Verdict will not be Disturbed upon Appeal.—A special verdict or finding will prevail and be taken over a general verdict returned at the same time by the jury, only when they are so inconsistent that both cannot stand. And if upon appeal it appears that there was evidence to sustain the general verdict, the judgment rendered thereon will not be disturbed, though the special finding returned at the same time may not seem to sustain it, pp. 355, 356.

Reaffirmed in *Moffitt v. Albert*, 97 Iowa 216, 66 N. W. 163; *Read & Traversy v. State Ins. Co.*, 103 Iowa 316, 64 Am. St. Rep. 180, 72 N. W. 668.

Reaffirmed and explained in *Spicer v. Webster City*, 118 Iowa 562, 92 N. W. 885, holding that an answer to a special interrogatory decisive of an important, though not determinative fact in issue, when without support in the evidence, but in conflict with it, is a sufficient showing of passion and prejudice on the part of the jury to call for a new trial; but that there is a distinction between answers to interrogatories in conflict with the undisputed testimony and those merely not supported by it, and the latter, when not essential to the verdict, do not furnish ground for interference with the verdict.

Reaffirmed and extended in *Purcell v. C. & N. W. Ry. Co.*, 117 Iowa 668, 91 N. W. 933, holding further that when a special verdict finds facts which are not essential to the general verdict, a judgment upon the latter will not be set aside for that reason *alone*.

Reaffirmed and extended in *Fishbaugh v. Spunaugle*, 118 Iowa 344, 92 N. W. 61, holding further that although there is an apparent inconsistency between some of the special findings and the general verdict, yet if, upon taking them as a whole, such inconsistency is not necessarily to be implied, the general verdict must stand: That no mere superficial inconsistency is sufficient to invalidate the verdict; but it must be so irreconcilable that both cannot possibly stand.

Cross reference. See Rule 1 hereof, and cross references there found.

McCREADY v. SEXTON & SON, 29 IOWA 356, 4 AM. REP. 214

1. Tax Sale of Land—Statute of Limitations, when Commences to Run.—Under Sec. 785 of the Code of 1860, the title to land sold for taxes vests in the tax sale purchaser when the tax deed is *executed and recorded* in the proper record of titles; and the statute of limitations (five years) prescribed by Sec. 790 of that code, commences to run against the owner of the land sold and for its recovery, from that time, and not from the date of sale, pp. 373, 374.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Rule 6 of Eldridge v. Kuehl (27 Iowa 160) ante. p. 381.

2. Tax Sale of Land—Conclusiveness of Recitals in Tax Deed—Sec. 784 of the Code of 1860, in part Unconstitutional—Tax Deed, What Prima Facie Evidence of—Essential and Directory Requirements to Valid Tax Sale of Land.—The Legislature cannot make a tax deed *conclusive* evidence of the regularity of proceedings which are essential to a valid tax sale of land, but can make such provision as to the non-essential steps or proceedings concerning it; and, therefore, so much of Sec. 784 of the Code of 1860 as provides that a tax deed is *conclusive* evidence that land sold thereunder was legally listed, assessed, levied upon and sold under a valid tax warrant and sold as prescribed by statute, is unconstitutional.

A levy of a tax is essential in order to fix the rate or proportion of the tax; listing is necessary to describe and identify the property; assessing is so to ascertain its value; and a tax warrant, or statutory provision is necessary, in order to authorize some person to receive the taxes and sell in default of payment; while the sale of the land is essential in order to contract the property to one who will pay the taxes due upon it, and to all of these such section is unconstitutional, when it attempts to make the tax deed *conclusive* evidence of their validity and regularity; but all other proceedings are *directory*, and such section is constitutional, and the recitals are *conclusive* evidence thereof.

Under such section a tax deed to land is *prima facie* evidence, however, of the regularity and validity of all prior proceedings, which evidence must be overcome by proof by the party attacking the sale, pp. 385-392.

Reaffirmed in Genther v. Fuller, 36 Iowa 605, 606, holding, however, that the illegality of part of the taxes for which land is sold will not invalidate the sale, when the rest of the taxes are legal.

Reaffirmed as to second and third paragraphs in Immegart v. Gorgas, 41 Iowa 441; Early v. Whittingham, 43 Iowa 164; Easton v. Savery, 44 Iowa 655; Ellis v. Peck, 45 Iowa 114, 115; Blair Town Lot & Land Co. v. Scott, 44 Iowa 146, 147.

Reaffirmed as to last paragraph in Henderson v. Oliver, 32 Iowa 514; Lorain v. Smith, 37 Iowa 71; Leavitt v. Watson, 37 Iowa 93.

Reaffirmed in part and overruled in part as to first and second paragraphs in Parker v. Sexton & Son, 29 Iowa 427-429; Hurley v. Powell, Levy & Co., 31 Iowa 66; Bulkley v. Callanan, 32 Iowa 465; Madson v. Sexton, 37 Iowa 562, 563, holding that a failure to comply with the statute as to giving notice for a tax sale of land, and other directory parts thereof, does not invalidate it; and that land may be so sold without a tax warrant.

Reaffirmed and explained in Hurley v. Woodruff, 30 Iowa 261, holding that a tax deed is admissible to prove title thereunder; and is *prima facie* evidence of the regularity and validity of all proceedings in relation to the listing, assessing, advertising and the legal sale of the realty, and of all other proceedings prior to the execution of the deed.

Reaffirmed and explained in Powers v. Fuller, 30 Iowa 477; Hurley v. Powell, Levy & Co., 31 Iowa 66; Bulkley v. Callanan, 32 Iowa 465; Madson v. Sexton, 37 Iowa 562; Easton v. Perry, 37 Iowa 683, holding that a tax deed is only *prima facie* evidence of the steps or proceedings which are *necessary* to a valid tax sale; but that it is *conclusive* as to the non-essential or directory ones.

Reaffirmed and explained in Rima v. Cowan, 31 Iowa 126, 128; Clark v. Thompson, 37 Iowa 539, holding that a tax deed to land is *conclusive* as to the *manner* of sale; and that when a tax deed recites that two parcels of land were sold separately, proof to contradict such recital and render the instrument void, because they were *in fact* sold in bulk and for a gross sum, is inadmissible.

Reaffirmed and explained in Bulkley v. Callanan, 32 Iowa 464, 465; Ware v. Little, 35 Iowa 236-238; Leavitt v. Watson, 37 Iowa 94, 95; Clark v. Thompson, 37 Iowa 541; Martin v. Cole, 38 Iowa 145, 148, 154, holding that the recitals in a tax deed are *conclusive* as to the legality and regularity of the *manner* of sale; and that when such recitals show that there was no irregularity or illegality as to the *manner* of sale, they are to be *conclusively* taken as true.

Reaffirmed and explained in Love v. Welch, 33 Iowa 193, 194, holding that a tax deed which recites that the land was sold for the taxes on the first Monday in December is not void by reason of the sale not being made at a time authorized by law, unless it is shown that the sale was made contrary to the provisions of Sec. 776 of the Code 1860; that although Sec. 763 of the Code of 1860 provides that all sales of land for taxes shall be made on the first Monday in October, yet Section 776 thereof provides that under certain conditions, such sales may be made on the first Monday of the next succeeding month in which they can be made; and that when a tax deed shows on its face that it was made on the first Monday of a succeeding month, it will be presumed, unless the contrary be shown, that the sale was as provided and allowed by Sec. 776, above mentioned.

Reaffirmed and explained in Hurlburt v. Dyer, 36 Iowa 475, holding that a recital in a tax deed as to the date of the sale will not

render it invalid; especially where it does not appear that the sale would have been invalid if made on the date recited in the instrument.

Reaffirmed and explained in Phelps v. Mead, 41 Iowa 472, 473, holding that a tax deed is *conclusive* evidence of the due performance and regularity of every step and proceeding in tax sales, as to time and manner of sale, etc.; and that no matter how irregular or informal the sale may have been conducted by the treasurer if there was a *bona fide* sale, in substance or in fact, the tax deed is *conclusive* evidence that it was done at the proper time and in the proper manner, these being merely directory and not fundamental steps.

Reaffirmed and explained as to second and third paragraphs in Robinson v. First Nat'l Bank of Cedar Rapids, 48 Iowa 357, holding that—under Sec. 897 of the Code of 1873, corresponding to the section of the text—the tax deed is *conclusive* evidence of the regularity of the *manner* of the assessment, listing and levy of taxes: But that it is *prima facie* evidence of the *fact* of assessment, listing and levy, but *conclusive* evidence that the *manner* thereof accords with the law.

Reaffirmed as to third paragraph in Farmers' Loan & Trust Co. v. Wall, and Milchrist, 129 Iowa 653, 654, 106 N. W. 160, holding that a tax deed is *prima facie* evidence that the grantee named therein was the tax sale purchaser; and that Sec. 1444 of the Code of 1897 makes the tax deed *conclusive* evidence of all matters as to the regularity and legality of the *manner and form* of the tax sale.

Reaffirmed and extended in Brown v. Scott, 34 Iowa 576, (abstract), holding further that a tax deed which is regular on its face is evidence of the title of the tax sale purchaser; and that the admission of the evidence in support of the recitals therein, if error at all, is without prejudice.

Reaffirmed and extended in Moore v. Cooke, 40 Iowa 291, 292; Prouty v. Tallman, 65 Iowa 355, 21 N. W. 675, holding further that when the records of the county are introduced, and are found not to contain any record of a levy of taxes for the year 1860, the presumption of levy which the execution and recording of the deed creates, is overcome, and the burden of proving a levy in fact, is thrown upon the party claiming under the deed, which he can do, only by showing that a record once existed, which has been lost or destroyed.

Reaffirmed and extended in Kessey v. Connell, 68 Iowa 432, 27 N. W. 365, holding further that the fact that land is sold for less than the total amount of the delinquent taxes due thereon, does not render the sale invalid.

Reaffirmed and varied as to second paragraph in Williams v. Poor, 65 Iowa 415, 21 N. W. 755, holding that when a tax is voted in aid of the construction of a railroad, it must be levied before it is valid; and that the levy is as much essential to the tax as the vote.

Reaffirmed and varied as to the second paragraph in Smithberg v. Archer, 108 Iowa 216, 217, 78 N. W. 847, holding that where the

county board of supervisors do not levy the mulct tax as provided by Sec. 9, of Chap. 62 of the Acts of 1894 (25th General Assembly), a sale for taxes under Sec. 10 of such law is *void*.

Cited as to second paragraph in Cassett v. Sherwood, 42 Iowa 626, the case turning on other points.

Distinguished in Galusha, treasurer v. Wendt, 114 Iowa 604, 87 N. W. 514, upholding the constitutionality of Sec. 1374 of the Code of 1897, relating to the assessment and collection of taxes on property omitted from assessment: And holding further that such section applies to the collection of taxes on property omitted from assessment, when properly taxable, for years previous to its taking effect.

Cross references. See further on this question, annotations under Eldridge v. Kuehl (27 Iowa 160), ante. p. 381; Allen v. Armstrong (16 Iowa 508), Vol. II, p. 465.

3. Tax Sale of Land—Certificate of Sale as Evidence of Title—Conflict between it and Tax Record—Latter to Prevail.—A certificate of a tax sale of land issued to the tax purchaser is admissible as evidence of his title; but in case of a conflict between it and the record of the sale made by the treasurer in the book provided for the purpose, the latter will prevail over the former, p. 374.

Reaffirmed in Henderson v. Oliver, 32 Iowa 514.

4. Tax Deed to Land Failing to Convey Title or Recite Facts Correctly—Power of County Treasurer to Execute Second Deed.—Where a tax deed to land fails to convey the legal title to the tax sale purchaser, or fails to correctly recite the facts, the county treasurer may execute a second deed to such purchaser conveying the legal title, or correcting the mistake in the recitals of the first deed. But this rule only applies where there has been a valid tax sale, pp. 382-385.

Reaffirmed in Parker v. Sexton & Son, 29 Iowa 424; Hurley v. Street, 29 Iowa 432, 433; Johnson v. Chase, 30 Iowa 309; Gray v. Coan, 30 Iowa 540, 541; Genther v. Fuller, 36 Iowa 607; Lorain v. Smith, 37 Iowa 71; Gould v. Thompson, 45 Iowa 451.

Reaffirmed and qualified in Bulkley v. Callanan, 32 Iowa 466, holding that where the county treasurer executes a sufficient and valid deed to land to a tax purchaser, a second and subsequent deed thereto made by that officer, is a nullity: That the county treasurer has power to make a second deed, *only* in case of an informal or insufficient execution of the first in substantial compliance with the law and the sale of the land.

(Note.—There are other cases sustaining, but not citing, the text.—Ed.)

5. Tax Sale—Fraud in—Owner may Set Aside for.—The owner of land may defeat or set aside a sale thereof for taxes by showing fraud committed by the officer selling it, or by the purchaser thereat, pp. 375, 376.

Reaffirmed in Butler v. Delano, 42 Iowa 355; Ellis v. Peck, 45 Iowa 115.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

6. Mandamus—When Lies.—The power or jurisdiction of a court to compel the doing of an act in all cases of mandamus, only arises where the corporation, board or person refuses or omits to do that which the law especially enjoins as a duty resulting from an office, trust or station, p. 381.

Reaffirmed in Polk & Hubbell v. Winett, 37 Iowa 36.

(Note.—There are many cases sustaining, but not citing, the text. This rule, however, is said by way of argument in the present case.—Ed.)

PARKER v. SEXTON & SON, 29 IOWA 421

1. Tax Sale of Land—Part of Taxes Illegal—Effect.—Where land is sold for taxes part of which is legal and part illegal, the sale and deed made thereunder are valid, (under Secs. 753 and 762 of the Code of 1860), pp. 423, 424.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Rule 4 of Eldredge v. Keuhl (27 Iowa 160), ante. p. 381.

2. Tax Deed to Land Failing to Convey Title or Recite Facts Correctly—Power of County Treasurer to Execute Second Deed.—Where a tax deed to land fails to convey the legal title to the tax sale purchaser, or fails to correctly recite the facts, the county treasurer may execute a second deed to such purchaser, conveying the legal title, or correcting the mistake in the recitals of the first deed. But this rule only applies where there has been a valid tax sale, p. 424.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Rule 4 of McCready v. Sexton & Son (29 Iowa 356), ante. p. 539, next preceding.

3. Tax Sale of Land—Tax Warrant not Necessary.—A valid sale of land for taxes may—under Secs. 751, 756, 763-765 of the Code of 1860—be made by the county treasurer, although a tax warrant be not issued by the clerk of the county board of supervisors, pp. 426-428.

Reaffirmed in Sully v. Kuehl, 30 Iowa 278; Johnson v. Chase, 30 Iowa 310; Hurley v. Powell, Levy & Co., 31 Iowa 65; Madson v. Sexton, 37 Iowa 563; Litchfield v. Hamilton County, 40 Iowa 68; C. R. & M. R. R. Co., and I. R. L. Co. v. Carroll County, 41 Iowa 173.

Cited in Gardner v. Early, 69 Iowa 44, 28 N. W. 428, holding that the power of the county treasurer to sell land for taxes is not derived from the tax list, but from the statute (Code of 1873): And that where it is sought to divest the owner of real estate of his title, by

ex parte proceedings, for his failure to pay taxes, strict conformity with the law in relation thereto is required.

Cited in McCready v. Sexton & Son, 29 Iowa 388, 4 Am. Rep. 214, this present case overruling the McCrady Case, to the extent of the text.

Cited in Tallman v. Cook, 43 Iowa 332, turning upon another question.

Cross references. See further on this question, annotations under McCready v. Sexton & Son (29 Iowa 356), ante. p. 539, next preceding; Corbin v. Hill (21 Iowa 70), Vol. II, p. 872.

HURLEY v. STREET, 29 IOWA 429

1. Tax Deed to Land Failing to Convey Title or Recite Facts Correctly—Power of County Treasurer to Execute Second Deed.—Where a tax deed to land fails to convey the legal title to the tax sale purchaser, or fails to correctly recite the facts, the county treasurer may execute a second deed to such purchaser, conveying the legal title, or correcting the mistake in the recitals of the first deed. But this rule applies, only where there has been a valid tax sale, pp. 432, 433.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Rule 4 of McCready v. Sexton & Son (29 Iowa 356), ante. p. 539.

2. Ejectment or Action of Right—Plaintiff to Recover on Strength of His Own Title.—In an action of ejectment or of right to recover real estate, the plaintiff must recover, if at all, on the strength of his own title and not upon the weakness of that of the defendant, p. 434.

Reaffirmed in Schlosser v. Cruikshank, 96 Iowa 417, 65 N. W. 345; Coulthard v. McIntosh, 143 Iowa 396, 122 N. W. 236.

(Note.—There are many cases, sustaining, but not citing, the text.—Ed.)

MORGAN v. LONG, 29 IOWA 434

1. Officers—Clerk of District and Circuit Court—Liability of Sureties on Bond of.—Under the Code of 1860, the clerk of the district and circuit courts and the sureties on his official bond, are liable for money received by him in satisfaction of a judgment rendered in either of his courts, pp. 435, 436.

Reaffirmed and extended in Walters-Cates v. Wilkinson, 92 Iowa 132, 133, 60 N. W. 516, holding further—as does the present case in argument—that the sureties on the official bond of the district court clerk, are liable for money paid to him by order of court, *to await the further order of the court*, and which he later fails to pay to the person adjudged entitled thereto, and to whom it is ordered paid.

Reaffirmed and varied in Wright & Co. v. Harris, 31 Iowa 274-276, holding that under Chap. 119 of the Acts of 1862 (9th General Assembly), the sureties on the official bond of a county judge, are liable for money collected by him from an executor, or another settling an estate, in satisfaction of a claim allowed, and which he (the county judge) fails to pay to the person entitled thereto.

Unreported citation, 90 N. W. 374.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

WALTERS v. GLATS, 29 IOWA 437

1. Animals — “Estray” Defined — When Owner of Animal Taken Up as Estray May Maintain Replevin.—An “estrays” is a domestic animal or beast which is wandering at large or lost, and whose owner is unknown by the party taking it up as an estray, under the statute—Code of 1860.

So where such an animal is taken up as an estray, by one who knows its owner, the latter may maintain replevin therefor, pp. 439, 440.

Reaffirmed and explained in Kinney v. Roe, 70 Iowa 510, 511, 30 N. W. 777, holding that where such an animal which is wandering at large is taken up as an estray by one who does not know its owner, the latter cannot maintain replevin; and that in such a case it is an estray, regardless of how it came to be so wandering.

WALTON v. GRAY, 29 IOWA 440

1. Action of Right to Recover Real Estate—Claim for Improvements—When to be Pleaded and Tried—Set-off and Counterclaim.—In an action of right to recover real estate, the defendant cannot—under Sec. 2264 of the Code of 1860—plead a claim for improvements, until after the question of title is settled, unless such claim be pleaded as a set-off or counterclaim, p. 441.

Reaffirmed in Walton v. Hall, 29 Iowa 443.

Reaffirmed in Fogg v. Holcomb, 64 Iowa 628, 21 N. W. 114, under Chap. 7, Title 13 of the Code of 1873.

Cited in Burkhardt v. Burkhardt, 107 Iowa 376, 77 N. W. 1072, the case turning on other points.

2. Pleading—Equitable Issue in Action of Right.—Where an answer in an action of right to recover real estate, sets up a tax title thereto in the defendant, it is not—under Secs. 2617 and 784 of the Code of 1860—such an equitable issue as will entitle him to demand that it be tried as such an issue, p. 442.

Reaffirmed in Walton v. Hall, 29 Iowa 443.

3. Tax Sale of Land for Taxes Which Are Paid, Void—Tax Deed Under, Void.—Where land is sold for taxes which have been

paid before the sale, it and the tax deed made thereunder are void, pp. 442, 443.

Reaffirmed in Walton v. Hall, 29 Iowa 443; Rath, Ex'r v. Martin, Ex'x, 93 Iowa 502, 61 N. W. 942.

Reaffirmed and varied in Fenton v. Way, 40 Iowa 197, 198, holding that where an owner of land redeems from a tax sale thereunder, a tax deed thereafter executed, passes no title, and a purchaser thereof from the tax sale purchaser will not be protected as against the land owner, although the tax record did not show the redemption, and the last purchaser became such without notice.

(Note.—See further, Harber v. Sexton, 66 Iowa 212, 23 N. W. 635; Iowa R. R. Land Co. v. Guthrie, 53 Iowa 386, 5 N. W. 519; Patton v. Luther, 47 Iowa 236; Morris v. Sioux County, 42 Iowa 416, some important cases on this question, not citing the text. And there are many others.—Ed.)

Cross references. See further in this connection, annotations under Rules 1-3 of Rice v. Nelson (27 Iowa 148), ante. p. 379; Noble v. Bullis (23 Iowa 559), ante. p. 134.

BONNEY, ADMINISTRATOR v. BONNEY, 29 IOWA 448

1. **Pleading—Demurrer to Whole of Pleading, One Count of Which is Good, to be Overruled.**—Where a demurrer is interposed to an entire pleading, one count of which is good, it must be overruled; and if it be sustained, it will be reversible error, pp. 450, 452.

Reaffirmed in Gordon v. Ch. R. I. & Pac. Ry. Co., 127 Iowa 756, 757, 106 N. W. 180.

(Note.—There are very many cases sustaining, but not citing, the text.—Ed.)

Cross reference. See further, sustaining the text, annotations and note under Jarvis v. Worwick (10 Iowa 29), Vol. I, p. 637.

2. **Contracts—Joint Obligors—When Release of One Does not Discharge All.**—As a general rule the release by the obligee of one of two or more persons, who are jointly or jointly and severally bound to him, is a discharge of all; but, a technical release will not have this effect if, looking at the whole instrument, the relations and circumstances of the parties, they cannot reasonably be supposed to have so intended. It will rather be construed as a mere agreement to charge the person or party to whom the release is given, p. 450.

Reaffirmed in Bell v. Perry & Townsend, 43 Iowa 372; Haney & Campbell Mfg. Co. v. Amaza Co-operative Co., 108 Iowa 319, 79 N. W. 81.

Special cross reference. For further cases citing the text, and others on this question, see annotations under Rule 3 of Turner v. Hitchcock (20 Iowa 310), Vol. II, p. 821; Seymour & Co. v. Butler (8 Iowa 304), Vol. I, p. 513.

3. Principal and Surety—Extension of Time of Payment to Principal without Consent of Surety—Discharge of Surety.—A binding agreement with the principal, by which the time of payment is extended without the consent of the surety, releases the latter; and courts will not stop to inquire whether he is prejudiced thereby, p. 451.

Cited in *Sawyers v. Campbell*, 107 Iowa 401, 78 N. W. 57, the court saying that an extension of time of payment of a promissory note is a material alteration thereof; the case involving what constitutes a material alteration of such an instrument.

Special cross reference. For further cases citing and sustaining the text, and others, see annotations under *Hershler v. Reynolds* (22 Iowa 152), ante, p. 14.

Cross reference. See further on this question, annotations and cross references under Rules 2-4 of *Chambers v. Cochran and Brock* (18 Iowa 159), Vol. II, p. 606.

BARCROFT, GEORGE & CO. v. HAWORTH, 29 IOWA 462

1. Partnership—Contracts by—Firm Name Need not be Used.—In order to bind a partnership by a contract made by one of its members it is not necessary that the firm name be used; but if it is the intention to bind the firm, and especially when it is so accepted, and the credit is given to the firm, it will bind it, p. 465.

Reaffirmed in *Baxter, Reed & Co. v. Rollins & Co.*, 90 Iowa 221, 48 Am. St. Rep. 432, 57 N. W. 840; *Thomas v. Hardsoeg*, 137 Iowa 599, 600, 115 N. W. 211.

Reaffirmed and extended in *Seekel v. Fletcher*, 53 Iowa 335, 5 N. W. 204, holding further that all the persons jointly interested in a written contract may be liable where one or more sign it, if it was intended to bind all, and was so accepted.

EVANS v. ROBBINS, 29 IOWA 472

1. Pleadings—Irrelevant and Redundant Matter May be Stricken out on Motion.—Under Sec. 2946 of the Code of 1860, irrelevant or redundant matter in a pleading may be stricken on motion; and this rule applies to a paragraph in a pleading which does not constitute or materially relate to the cause of action or defense, pp. 474, 475.

Reaffirmed in *Seaton v. Grimm*, 110 Iowa 147, 148, 81 N. W. 225.

(Note.—There are many cases under the various codes, sustaining, but not citing, the text.—Ed.)

McTUCKER v. TAGGART, 29 IOWA 478

1. Deeds and Other Written Instruments—Reformation in Equity for Mistake in—Degree of Proof Required.—Before a deed or other written instrument, will be reformed in equity because of

a mistake therein, the mistake must be made entirely clear and be established by the most satisfactory proof, p. 479.

Reaffirmed and explained in Wachendorf v. Lancaster, 61 Iowa 509, 14 N. W. 316, holding that before a written instrument can be reformed on the ground that there was a mistake in drafting it, the evidence that there was a mistake must be clear, satisfactory, and free from reasonable doubt.

Reaffirmed and explained in Hunt v. Gray, 76 Iowa 272, 41 N. W. 15, holding that when a party undertakes to show by parol that a written agreement fails, owing to some mutual mistake, to express the true contract, the fact of the mistake must be established by proof of the most satisfactory character.

Reaffirmed and explained in West v. West, 90 Iowa 44, 47, 57 N. W. 39, holding that a written contract or other instrument will be reformed in equity for fraud, accident or mistake, when the proof thereof is of such a degree as to produce in the unprejudiced mind, in view of all the facts and circumstances surrounding the transaction, the belief and conviction of its existence.

Reaffirmed and extended in Ch. Title & Trust Co., Rec'r v. Smith, 94 Iowa 405, 62 N. W. 793; Murphy v. First Nat'l Bank of Cedar Falls, Rec'rs, 95 Iowa 329, 63 N. W. 703, holding further that before a written instrument will be reformed in equity, on the ground of fraud, accident or mistake, the proof must make out the fact, so as to strike all minds that it is unquestionable and free from reasonable doubt.

Cross references. See further on this question, annotations under Tufts & Colly v. Larned (27 Iowa 330), ante. p. 408; Gelpcke et al. v. Blake (15 Iowa 387), Vol. II, p. 355.

HELPHREY v. CHICAGO & ROCK ISLAND R. R. CO., 29 IOWA 480

1. Trial—Verdicts General and Special—Judgment on Special Verdict.—A verdict, general or special is sufficient if it expresses the intention of the jury, and when it, upon the matters in issue, is sufficiently definite to enable the court to pronounce judgment thereon, it is not necessary that there should be a general verdict for either party; and when the special verdict is thus certain and definite, the court may enter judgment thereon, although no general one be returned by the jury, pp. 382, 383.

Reaffirmed and explained in Morbey, Adm'x v. Ch. & N. W. Ry. Co., 116 Iowa 89, 89 N. W. 107, holding—under Sec. 3726 of the Code of 1897—that a special verdict is in lieu of a general verdict, and its design is to exhibit all the ultimate facts, and leave the legal conclusions entirely to the court; but that findings of fact by the jury, in answer to interrogatories do not dispense with the general verdict: That a special verdict covers all the issues, while the answers

to a special interrogation may respond to but a single inquiry, pertaining merely to one issue, though essential to the general verdict.

Cited in Jacobson v. U. S. Gypsum Co., 150 Iowa 338, 130 N. W. 125, the court holding that where, in an action for damages for personal injuries, the jury return a verdict for plaintiff for a certain sum, with interest at six per cent. from a named date (the date of the injury), the court may compute the interest, and include it in the judgment.

Cross references. See further in this connection, annotations under Rules 3 and 4 of Bonham v. Iowa Central Ins. Co. (25 Iowa 328), ante. p. 271; Rule 2 of Edwards v. McCaddon (20 Iowa 520), Vol. II, p. 857; Rule 3 of State v. Turner (19 Iowa 144), Vol. II, p. 707.

QUICK v. BROOKS, ADM'R, 29 IOWA 484

1. Evidence—Adverse Party an Executor—Competency of Evidence.—Under Secs. 3980, 3982 of the Code of 1860, where the plaintiff gives his deposition in an action during the life-time of the defendant and relative to transactions between them, and thereafter (pending the action) the defendant dies, and his administrator is substituted as the defendant, such deposition is inadmissible—the decedent, defendant, not having given his deposition therein before his death, pp. 485-487.

Reaffirmed and extended in Greenlee v. Mosnat, Ex'x, 136 Iowa 642, 645-648, 14 L. R. A. (New Series) 488, 111 N. W. 998, holding further that the transcript derived from short-hand notes of the testimony of plaintiff given on the first trial relative to transactions between him and defendant, cannot—under Sec. 4604 of the Code of 1897—be received as evidence of the plaintiff, upon a second trial had after the death of the defendant: And that Sec. 4605 of that Code, relative to depositions *de bene esse* or to perpetuate testimony, nor Chap. 9, Acts of 1898 (27th General Assembly), Code Supplement of 1902, Sec. 245a, does not affect this rule.

Cross reference. See further in this connection, annotations under Watson, Adm'r v. Russell (18 Iowa 79), Vol. II, p. 588.

CHESIRE v. TAYLOR, 29 IOWA 492

1. Negotiable Note—Waiver of Demand on Maker and Notice Thereof, by Indorser.—Where the indorser of a negotiable promissory note, with knowledge, acknowledges his liability thereon, promises to pay it, and arranges for delay in proceedings at law for its collection, he thereby waives want of demand, notice of non-payment, and other failures of duty and laches of the holder thereof, p. 493.

Special cross reference. For cases citing and sustaining the text, see annotations under Hughes v. Bowen (15 Iowa 446), Vol. II, p. 362.

CAULKINS v. WHISLER, 29 IOWA 495, 4 AM. REP. 236

1. Negotiable Note—Forgery of—Innocent Holder.—Where a negotiable note is forged without the fault of its apparent maker or without his affording the forger the opportunity by his negligent conduct, it is void as against such apparent maker, even in the hands of an innocent holder, who took for value, without notice and before maturity.

So where a person signs his name on a piece of blank paper and leaves it with another for the purpose of his signature being later identified, and the person with whom it is left prints a negotiable promissory note over such signature, it is void, even in the hands of such a holder, pp. 495, 496.

Reaffirmed in First Nat'l Bank of Grand Haven v. Zeims, 93 Iowa 144-146, 61 N. W. 484.

(Note.—See further, Conger v. Crabtree, 88 Iowa 536, 55 N. W. 335; First Nat'l Bank of Grand Haven v. Hall, 83 Iowa 645, 50 N. W. 644; Charlton v. Reed, 61 Iowa 166, 16 N. W. 64; Scofield v. Ford, 56 Iowa 370, 9 N. W. 309; Fayette County Sav. Bank v. Steffes, 54 Iowa 214, 6 N. W. 267; Knoxville Nat'l Bank v. Clark, 51 Iowa 264, 1 N. W. 491; Robinson v. Reed, 46 Iowa 219, some important cases on this question, not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Douglass v. Matting (29 Iowa 498), *Infra*, next succeeding.

DOUGLAS v. MATTING, 29 IOWA 498, 4 AM. REP. 238

1. Negotiable Note—Fraud and Other Latent Infirmities—Negligence of Maker—Forgery—Rights of Bona Fide Holder.—Where there was fraud practiced on the maker of a negotiable note, or it has other latent infirmities, not amounting to forgery, it is nevertheless good in the hands of an innocent holder, for value, who took before maturity and without notice: And such defenses cannot be pleaded by the maker against the latter.

This rule applies where a person signs a paper, believing that it is a contract when it is a negotiable note, although he so signs relying upon the false and fraudulent representations of the payee, pp. 499, 500.

Reaffirmed and extended in Wright, Dryden & Co., v. Flime, 33 Iowa 162, holding further that where, through the carelessness of the maker, a negotiable note is given to another, it is binding upon the maker in the hands of an innocent holder.

Distinguished and narrowed in Knoxville Nat'l Bank v. Clark, 51 Iowa 271-273, 33 Am. Rep. 129, 1 N. W. 498, holding that a forged negotiable instrument is unenforceable in whosoever hands it may come; and that where a negotiable note which is not in blank, is materially altered after its execution and without the consent of the maker, such fact is a defense to an action thereon by a *bona fide* holder

who obtained it before maturity and for value: Hence holding that where a negotiable note for "\$10.———ten dollars" is so altered before indorsement to read "\$110.———One Hundred and Ten dollars," such alteration is a defense in an action thereon by a *bona fide* holder who obtained it for value and before maturity.

Distinguished and narrowed in Scofield v. Ford, 56 Iowa 371-373, 9 N. W. 310, holding that where a negotiable note is materially altered, it is not valid even in the hands of an innocent purchaser for value and before maturity; and that where there is a memorandum or contract written upon the same paper, qualifying the terms of the note, and such contract or memorandum is severed, the note is thereby materially altered: But, says the court, if the maker were guilty of gross carelessness it may be that he ought to be precluded from setting up the invalidity of the note as against a *bona fide* holder for value.

Distinguished and narrowed in Green v. Wilkie, 98 Iowa 77-80, 60 Am. St. Rep. 184, 36 L. R. A. 434, 66 N. W. 1047, holding that where an illiterate man who cannot read or write signs a note and a mortgage, relying upon the false and fraudulent representations of the husband of the payee and mortgagee that the instruments were a lease and a note of his (the signer's) father which he was to sign, the instruments are void, even in the hands of an innocent assignee and holder for value.

Distinguished and narrowed in Green v. Wilkie, 98 Iowa 80, 60 Am. St. Rep. 184, 36 L. R. A. 434, 66 N. W. 1047; Eldorado Jewelry Co. v. Darnell, 135 Iowa 558, 113 N. W. 345, holding that a party who is ignorant of the contents of a written instrument from inability to read, who signs it without intending to, and who is charged with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery: And it is void even in the hands of an innocent holder for value.

Cross references. See further on this question, annotations under Caulkins v. Whisler (29 Iowa 495), next preceding this present case; Lake v. Reed (29 Iowa 258), ante. p. 523; McDonald v. Muscatine Nat'l Bank (27 Iowa 319), ante. p. 407; annotations and cross references under Gage v. Sharp (24 Iowa 15), ante. p. 140; and the excellent editorial notes under Green v. Wilkie, 80 Iowa 74. See, also, in this connection, Briggs v. Ewart, 11 Am. Dec. 445; McGinn v. Tobey, 4 Am. St. Rep. 848; Walker v. Egbert, 9 Am. Rep. 548; Gibbs v. Linabury, 7 Am. Rep. 675; Schuylkill County v. Copley, 5 Am. Rep. 441.

HUSE v. HAMBLIN, 29 IOWA 501, 4 AM. REP. 244

1. **Bills and Notes—When Negotiable and When not.**—Under Sec. 1797 of the Code of 1860, instruments promising to pay a sum of money or property are negotiable, only when it is the manifest intention of the parties; and an instrument promising to pay a certain sum at a certain time *in currency* at a certain banking-house to a person "or

order" or "or bearer" is not a promissory note or negotiable. The fact that such instrument is payable at a banking-house, independent of a custom to thereby make it so, does not render it negotiable; and such a custom must be affirmatively shown, pp. 503-505.

Reaffirmed in Huse v. McDaniel, 33 Iowa 414, 418.

Reaffirmed and extended in Culbertson v. Nelson, 93 Iowa 197, 57 Am. St. Rep. 266, 27 L. R. A. 222, 61 N. W. 857, holding further that the use of the words "value received" in such an instrument, does not change the rule.

Reaffirmed and extended in Dille v. White, 132 Iowa 346, 10 L. R. A. (New Series) 510, 109 N. W. 916, holding further that a check payable in "current funds" is not negotiable.

Reaffirmed and qualified in Haddock v. Woods, 46 Iowa 435; American Em. Co. v. Clark, 47 Iowa 672, holding that an instrument payable in "current funds" is negotiable, when supported by proof of a custom showing that such term meant "money;" and that in such case parol evidence is admissible to prove that the parties understood the term to mean "money."

Cross reference. See further on this question, annotations under Rindskoff Bros. & Co. v. Barrett (11 Iowa 172), Vol. I, p. 795.

2. Non-Negotiable Instruments—Liability of Indorsers—Rights of Holder.—Under Sec. 2754 of the Code of 1860, the holder of a non-negotiable instrument may sue the maker and any or all of the indorsers thereof, without demand on the maker and notice of non-payment, p. 506.

Reaffirmed in Huse v. McDaniel, 33 Iowa 418; Lynch v. Mead, 99 Iowa 68, 68 N. W. 580; Dille v. White, 132 Iowa 342, 10 L. R. A. (New Series) 510, 109 N. W. 915, under the various codes of 1860, 1873 and 1897.

Cross references. See further on this question, annotations under Tucker v. Shiner (24 Iowa 334), ante. p. 193; Billingham v. Bryan (10 Iowa 317), Vol. I, p. 693.

3. Contracts—Promissory Notes—Liability of Indorser—Lex Loci Contractus.—The law of the place where the contract of indorsement of a promissory note was made governs the liability of the indorser, p. 504.

Reaffirmed in Nat'l Bank of Michigan v. Green, 33 Iowa 146.

Reaffirmed and explained in Davis v. Miller, 88 Iowa 118, 55 N. W. 90, holding that the liability of the maker of a negotiable instrument is determined by the law of the place where it is to be performed, but the liability created by an indorsement is to be fixed and construed, according to the law of the place where it was made.

Cross reference. See further on this question, annotations under Rule 2 of Tharp, Smith & Hanchett v. Craig (10 Iowa 461), Vol. I, p. 730.

4. Note or Other Paper Payable in "Currency"—Evidence of Custom Varying Meaning of Word "Currency."—Where a note or certificate of deposit is payable in "currency," it may be that evidence of a custom showing that *currency* at the place where the contract was made means "*money*," and that therefore the paper is negotiable or commercial paper, is competent; but this is not decided herein, p. 505.

Cited in State ex rel. Carroll v. Corning State Sav. Bank, 136 Iowa 81, 113 N. W. 501, the court holding that the issuance of a certificate of deposit does not in and of itself indicate the true nature of the transaction: That such an instrument may be issued, although a loan was intended; and parol evidence is admissible to show the true nature of the transaction.

BOALS v. SHULES, 29 IOWA 507

1. Default Judgment Entered upon Insufficient Original Notice—Power of Court to Set Aside.—Under Sec. 2666 of the Code of 1860, where a default judgment is entered upon an original notice so defective as to amount to *no notice*, the court may at any time during the term at which it was rendered, set it aside, upon motion of the defendant, or upon his own motion.

Sec. 3150 of the Code of 1860, requiring an affidavit showing merits or defense, and a reasonable excuse to be made by defendant, to authorize the court to set aside a judgment by default, has application only to cases where the court had authority to render the judgment; and in the above case the court had no such authority, pp. 508, 509.

Reaffirmed and explained in United States Rolling Stock Co. v. Potter, 48 Iowa 66, 67, holding that Sec. 2871 of the Code of 1873, corresponding to Sec. 3150 of the Code of 1860, does not apply where a judgment by default has been entered without legal authority, either by reason of the insufficiency of the notice or of its service, when it is so defective as to confer no jurisdiction upon the court.

Reaffirmed and explained in Hoitt, and Merchants' Sav. Bank v. Skinner, 99 Iowa 363-366, 68 N. W. 789, holding that when defendant is served with a copy of an original notice which is not signed by plaintiff's attorney, and the copy does not show that the original was so signed, and the original is not read to him at the time of the service, it amounts to *no notice*, and a judgment thereon by default is void and will be set aside upon defendant's motion, without his complying with Sec. 4078 of McClain's Code, Sec. 3790 of the Code of 1897, in reference to setting aside defaults.

Reaffirmed and varied in Brandt v. Wilson, 68 Iowa 486, 487, applying the rule where a default was entered prematurely.

Reaffirmed and varied in Cooper v. Disbrow, 106 Iowa 558, 76 N. W. 1016, applying the rule where the defendant was adjudged

to be in default when he was not so in fact: And holding, also, that in order to constitute a judgment by consent or agreement, such fact must appear of record in the action wherein it was rendered.

Reaffirmed and qualified in Hartley v. Bartruff, 112 Iowa 594, 84 N. W. 705, holding that a change in the time or manner of enforcing a judgment, or other condition therein as to these, may be made by the court after the term at which it was rendered, upon application and before the judgment is signed and approved.

Cited in Wolmerstadt v. Jacobs, 61 Iowa 373, 16 N. W. 217, the court holding that the trial court may, under Sec. 178 of the Code of 1873, corresponding to Sec. 2666 of the text, at any time during the term at which an order, or judgment is rendered, set it aside, upon his own or other motion.

Distinguished in Culbertson v. Salinger & Brigham, 122 Iowa 14, 97 N. W. 100, holding that a default entered after appearance, is merely erroneous and not void, and will not be set aside after the term, until it has been adjudged that there is a defense to the action.

Cross reference. See Rule 2 hereof. See further on this question, annotations and cross references under Kitsmiller v. Kitchen (24 Iowa 163), ante. p. 158.

2. Actions—Original Notice—What to Contain—When Insufficient to Confer Jurisdiction to Enter Judgment.—The original notice must—under Sec. 2812 of the Code of 1860—name and designate the particular term of court at which the defendant is to appear and answer; and it must be clear and unmistakable as to the term and time that the defendant is to appear and answer; and a notice warning defendant to appear “on or before noon of the second day of the April term of the district court, to begin on the twelfth day of April, 1870,” (the day named being before the commencement of the term), is insufficient and confers no jurisdiction on the court to enter judgment by default, p. 509.

Reaffirmed and explained in Gaar, Scott & Co. v. Taylor, 128 Iowa 639, 640, 105 N. W. 126, holding that a service of notice by publication on the 29th day of the month requiring the defendant to appear on the 12th day of the same month, is *no notice*, and confers no jurisdiction on the court to render judgment, and a judgment rendered thereon is void.

Special cross reference. For further cases citing and sustaining the text, and many others on the question, see annotations under Rules 1 and 2 of Shawhan v. Loffer (24 Iowa 217), ante. p. 176; Kitsmiller v. Kitchen (24 Iowa 163), ante. p. 158.

Cross reference. See further on this question, annotations under Des Moines Branch of State Bank v. Van (12 Iowa 523), Vol. II, p. 88.

3. Actions—Original Notice—Defects in or in its Service—Appearance Waives.—Defects in the original notice or in its service

is waived by the defendant entering his appearance, and he cannot thereafter, in another action, raise or rely thereon. But an appearance for the purpose of moving to set aside a judgment by default entered without authority, because the original notice was so defective as to constitute *no notice*, does not enter the appearance of the defendant to the action, nor cure or make the notice valid, or amount to a waiver thereof, p. 509.

Special cross reference. For cases citing the text, and others, see annotations under *Wilsey v. Maynard* (21 Iowa 107), Vol. II, p. 879.

DAVIS v. GRAHAM, 29 IOWA 514

1. Principal and Surety—Extension of Time—When Discharges Surety.—Any binding agreement between the creditor and the principal, made without the consent of the surety, whereby the creditor may not sue on the debt for a given time, discharges the surety; but if the creditor is neither expressly nor impliedly disabled by the agreement from suing on the demand at any time, the claimed enlargement of the credit will not discharge the surety, pp. 517, 518.

Reaffirmed in *Bonney, Adm'r v. Bonney*, 29 Iowa 451; *Murray v. Graham*, 29 Iowa 521.

Reaffirmed and qualified in *Morgan v. Thompson*, 60 Iowa 283, 14 N. W. 308, holding that a contract for forbearance, in order to be valid, must not be indefinite as to the term for which the extension is made; and holding, also, that when the suretyship is not shown upon the face of the note, notice thereof to the creditor must be proved, in order to enable the surety to avail himself of the protection the law secures to him.

Unreported citation, 109 N. W. 793.

Cross reference. See further on this question, annotations and cross references under Rule 3 of *Bonney, Adm'r v. Bonney* (29 Iowa 448), ante. p. 546.

MURRAY v. GRAHAM, 29 IOWA 520

1. Promissory Note—Material Alteration of—Effect—Recovery of Consideration, etc.—Where a promissory note is materially altered by the payee or holder without the consent of the maker or his sureties, the note is extinguished and unenforceable; but the payee or holder may recover of the maker or principal the consideration thereof received by him, in an action based upon an implied contract.

An alteration, however, by accident, mistake or the act of a stranger, will not destroy or extinguish the instrument.

But where, after its execution and delivery, a note is altered by one of its makers who claims to have authority from the others therefor, so as to correct what is believed to be a mistake therein, with the assent of the holder who is acting in good faith, but without the knowledge or consent of the other makers of the note, such holder may

restore the note to its original form and hold all the makers liable thereon, pp. 526-529.

Reaffirmed as to second paragraph in Matheas et al., Ex'rs v. Leather, 99 Iowa 21, 22, 68 N. W. 449, 450.

Reaffirmed and explained as to first paragraph in Eckert & Williams v. Pickel, 59 Iowa 548, 549, 13 N. W. 709, holding that any material alteration of a promissory note by the holder thereof avoids the note, and no action can be maintained thereon, even though the alteration be made innocently and without any fraudulent intent.

Reaffirmed, explained and qualified in Phillips v. Cripps, 108 Iowa 609, 79 N. W. 374, holding that even in event of an innocent change without the consent of the maker, recovery cannot be had on the note; but that where it is expressly agreed that the alteration shall be made, and this is done by the payee, though without the knowledge of the maker, then an action may be maintained on the note; for no more has been done than to carry out the intention of the parties.

Reaffirmed and extended as to first paragraph in Marsh v. Griffin, 42 Iowa 405, 406, holding further that where, after a note is signed by a surety, it is materially altered by the principal with the consent of the payee or holder, but without the knowledge or consent of the surety, the latter is discharged from liability on the note and from all liability whatever.

Cited in Rainbolt v. Eddy, 34 Iowa 441, 442, 11 Am. Rep. 152, the court holding that where, after execution and delivery, the payee without the maker's knowledge or consent, inserts "ten per cent. inst." in a blank in such note and makes the alteration in such a manner as to afford no suspicion thereof or the means of detecting it, such note, as altered, is valid as against the maker, in the hands of an innocent purchaser, for value and before maturity.

Cross references. See further on this question, annotations under *McCramer v. Thompson* (21 Iowa 244), Vol. II, p. 898; *Hall, Adm'x v. McHenry* (19 Iowa 521), Vol. II, p. 758.

BAIRD v. MORFORD, 29 IOWA 531

1. Negligence or Unskillfulness—Action Because of—Burden of Proof—Proof Required of Plaintiff.—In an action for personal injuries claimed to have been caused by the negligence or unskillfulness of the defendant, the plaintiff must not only prove that the defendant was guilty of such acts or omissions as constitute negligence or unskillfulness, but must further prove that his own negligence was not in whole or in part the proximate cause of the injury, p. 536.

Reaffirmed in Patterson v. B. & M. R. R. Co., 38 Iowa 280; *Nelson v. C. R. I. & P. R. R. Co.*, 38 Iowa 567; *Rabe v. Sommerbeck*, 94 Iowa 658, 63 N. W. 458; *Decatur v. Simpson*, 115 Iowa 350, 88 N. W. 840.

Reaffirmed and explained in Lange v. Holiday Coal Creek R. R. & Coal Mining Co., 49 Iowa 472, holding that in an action for an injury to or the death of a person claimed to have been caused by the negligence of the defendant, the burden of proof is on the plaintiff to show, either by direct proof or from circumstances, that the person injured or killed did not contribute thereto by his own negligence.

Reaffirmed and extended in Gamble v. Mullin, 74 Iowa 101, 36 N. W. 910, holding further that in an action for negligence which injured plaintiff's animal and afterwards caused its death, the plaintiff who had control of it after the injury, must prove that the injury and death was not proximately caused by his negligence or want of care: And this is the rule, although the defendant specially pleads contributory negligence.

Reaffirmed and extended in Rabe v. Sommerbeck, 94 Iowa 658, 63 N. W. 458; Kleineck v. Reiger, 107 Iowa 327, 78 N. W. 39, holding further that in an action for damages for personal injuries caused by the negligence, or unskillfulness of the defendant, where the petition fails to aver a want of contributory negligence on the part of the plaintiff, a motion in arrest of judgment must be sustained (under the Codes of 1873 and 1897).

Reaffirmed and qualified in Bullard v. Mulligan, 69 Iowa 419, 29 N. W. 405, holding that the doctrine of contributory negligence does not apply in an action for negligent injury of property not under the personal control or management of the plaintiff at the time of the injury, and when he is not present thereat.

Cross references. See further on this question, annotations under Greenleaf, Adm'r, v. Ill. Cent. R. R. Co. (29 Iowa 14), ante. p. 489; Rule 5 of Donaldson et al., Adm'rs v. M. & M. R. R. Co. (18 Iowa 280), Vol. II, p. 627.

JEMMISON v. GRAY, 29 IOWA 537

1. Trial—Practice—Excluding Defendants from Court-Room During Examination of Co-Defendant as Witness—When not Reversible Error.—The excluding by the court of some of the defendants from the court-room during the examination of a co-defendant as a witness upon the trial of a civil action by jury, is not reversible error, when the record upon appeal, does not show that prejudice to the substantial rights of the defendants resulted therefrom. But parties to an action should not be excluded from the court-room during any portion of the trial, pp. 539, 540.

Cited in State v. Pell, 140 Iowa 664, 119 N. W. 158, the court holding that it is within the judicial discretion of the trial court to except from a rule on witnesses and their exclusion from the court-room upon the trial of an indictment, those persons who have the most direct personal interest in the conviction of accused; such as the widow and daughter of deceased upon the trial of an indictment for murder: And holding further that even if a witness violates the rule

or order of the court excluding him, he is not incompetent to testify, but is subject to punishment for contempt.

2. Contracts for Delivery of Personal Property—Breach of—Measure of Damages.—In an action for damages for breach of a contract to deliver personal property, the measure of damages, when the price is not paid or advanced before the time for delivery, is the difference between the contract price and the market value at the time and place stipulated for the delivery; and this is the rule, in such case, unless the contract expressly stipulates for a different measure of damages upon breach, pp. 541, 542.

Reaffirmed in Osgood v. Bauder & Co., 75 Iowa 559, 1 L. R. A. 655, 39 N. W. 891.

Reaffirmed and explained in Cobb, Blasdel & Co. v. I. C. R. R. Co., 38 Iowa 630, 631, holding that in an action by the seller of personal property against a common carrier for failing and refusing to transport it to a distant place where it was to have been delivered at a given time, the measure of damages is the difference in its value at the place where it was offered for transportation and the contract price for which it was sold, less the freight charges to the place where it was to have been delivered.

Reaffirmed and varied in Harrison v. Charlton, 37 Iowa 136, 137, holding that where one purchases all the stock of lumber on a certain lumber yard at a certain price, to be later invoiced and delivered to him, paying no part of the purchase price, the seller not to add new lumber to the stock, that in an action by the seller for the purchase price, the buyer may recover on a counterclaim, the difference between the contract price and the market value of lumber fraudulently added by the seller to the stock before the invoice and delivery.

Reaffirmed and varied in Brownell & Co. v. Chapman, 84 Iowa 507, 508, 35 Am. St. Rep. 326, 51 N. W. 250, holding that in an action for breach of a contract of sale of an article of personal property (in this case a boat to be used on a lake for the carriage of passengers for hire) to be delivered within a certain number of days, the buyer may recover as damages for breach of this condition, the rental value of the same kind of boat for the number of days the seller failed to so deliver it.

Cross reference. See other rules hereof, in this connection. See further on this question, annotations under Rule 2 of Boies & Barrett v. Vincent (24 Iowa 387), ante. p. 203.

3. Damages—Speculative Damages not Allowed—Trial—Instructions.—In an action for damages, the jury is to be instructed on the measure thereof, according to legal rules; and instructions which leave the amount or estimation of damages to the speculation or conjecture of the jurors, unconfined by legal rules or limits, are reversible error, pp. 544, 545.

Reaffirmed in Simons and Werthman v. Mason City & Ft. Dodge R. R. Co., 128 Iowa 152, 153, 103 N. W. 134.

4. Contract to Render Services or to Deliver Personal Property—Breach by Contractor, and Action on Quantum Meruit—Defenses.—Where one contracts to render certain services or to deliver a certain quantity of personal property, and, after performing part of his contract, fails to complete it or is guilty of a breach thereof, he may maintain an action against the other party upon a *quantum meruit*; but the defendant (the other contracting party) may therein set up as a full or a partial defense, the amount it will reasonably cost to complete the work, together with any damages sustained by reason of the non-fulfillment or breach of the contract. But, if in such case, the contractor sues upon the express contract, he cannot recover upon the *quantum meruit*, p. 547.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under McClay v. Hedge (18 Iowa 66), Vol. II, p. 586; and see cross references there found.

5. Appeal—Insufficient Bill of Exceptions—Verdict Against Evidence—Affirmance.—Unless the bill of exceptions shows that it contains *all of the evidence* adduced below, the Supreme Court will not reverse because the verdict was against the evidence. A bill of exceptions which shows that it contains, or is certified as containing only “substantially all” of the evidence, is insufficient to justify a reversal on such above ground, p. 550.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Lea v. Roads (22 Iowa 408), ante. p. 48.

STATE v. STAPP, 29 IOWA 551

1. Criminal Law—Statutory Provisos—When to be Negatived in Indictment and When to be Proved as Defense—Intoxicating Liquors—Violation of Statute Regarding Sale, etc., of—Defenses.—If an exception or proviso be part of the enacting clause, or clause creating an offense of a statute, an indictment therefor must negative the exception or proviso; but if an exception or proviso be contained in a subsequent part of such a statute, either in the same or a subsequent section, and is separate and distinct, it is a matter of defense, and is not required to be negatived in the indictment.

So an indictment for violation of the intoxicating liquor law, or for maintaining a nuisance in violation thereof, need not negative the exceptions in the statute which make a sale or keeping of intoxicating liquors lawful; but such a fact, if it existed, must be proved by accused as a defense, p. 554.

Reaffirmed in State v. Curley, 33 Iowa 360, 361; Worley v. Spurgeon, 38 Iowa 467, 468; Becker v. Betten, 39 Iowa 671, 672; State v. Harris, 64 Iowa 291, 20 N. W. 441.

Reaffirmed and explained in State v. Kendig, 133 Iowa 168, 169, 110 N. W. 465, holding that when an exception is embodied in the body of the clause, it must be alleged in the indictment; but that when, in a statute, there is a clause for the benefit of the State, and afterwards follows a proviso or exception in favor of the defendant, the latter is a matter of defense and need not be alleged in the indictment: Hence holding that an indictment for practicing medicine without a license, under Secs. 2579 and 2580 of the Code of 1897, need not negative the exceptions contained in such sections.

Reaffirmed and explained as to first paragraph in State v. Conable, 81 Iowa 67, 46 N. W. 762, holding that an indictment for criminal libel need not aver that the libel was not a privileged communication.

Reaffirmed and explained as to first paragraph in State v. Mahan, 81 Iowa 122, 123, 46 N. W. 856, holding that under Sec. 4008 of the Code of 1873, an unmarried person who commits adultery with a married one, may be indicted therefor without complaint of the consort of the other guilty party: And that an indictment for adultery against a married person, need not aver that the prosecution was commenced upon complaint of the injured consort, this being a defense to be proved by him, where such is true.

Cross references. See further on this question, annotations and cross references under Rule 1 of State v. Williams (20 Iowa 98), Vol. II, p. 782.

SALLADAY v. BAINHILL, 29 IOWA 555

1. **Judgment of District Court—Recital as to Service of Notice May be Contradicted Showing No Notice—Void Judgment.**—In an action on a judgment of a justice's court of this State, extrinsic or even parol evidence is admissible to show that the defendant was served with *no notice*, and that the judgment is, therefore, *void*, although it recites that the defendant was served with due notice, pp. 555, 556.

Reaffirmed and extended in Lowe v. Lowe, 40 Iowa 223, 224, holding further that in an action upon a judgment of a sister state, want of jurisdiction may be shown in the court, by proof contradicting the recitals or adjudication set out in the record.

Cross references. See further on this question, annotations and cross references under Newcomb v. Dewey (27 Iowa 381), ante. p. 413; Pollard v. Baldwin (22 Iowa 328), Vol. II, p. 37.

MERCER v. MERCER, 29 IOWA 557

1. **Conveyances—Consideration of Natural Love and Affection—Validity of Conveyance Based on.**—A conveyance of land having for its consideration the natural love and affection of the grantor for the grantee is good as to all, except the creditors of the grantor and subsequent purchasers without notice, p. 558.

Reaffirmed in Craven v. Winter, 38 Iowa 480; Burgess v. Pollock, 53 Iowa 273, 36 Am. Rep. 218, 5 N. W. 180.

Reaffirmed and explained in Paulus v. Reed, 121 Iowa 226, 96 N. W. 758, holding that the consideration of love and affection will support a deed by husband to wife, when the rights of third persons do not intervene.

Reaffirmed and qualified in Patterson, Guardian v. Mills, 69 Iowa 758, 28 N. W. 54, holding that an advancement by a parent to a child is a good consideration, and will support a contract or conveyance; except as against other children and against creditors and subsequent purchasers without notice.

Cited in Gardner v. Lightfoot, 71 Iowa 580, 32 N. W. 512, turning on other questions.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

Cross references. See further in this connection, annotations under Cecil v. Beaver (28 Iowa 241), ante. p. 448.

2. Conveyances—Delivery, Sufficiency of.—Where, at the time of the execution of a deed by a father to certain of his children, the grantees were present, and immediately thereafter the instrument passed into their hands, and it appears that it was the intention of the grantor that it be delivered, such facts constitute a "delivery," p. 560.

Special cross reference. For cases citing and sustaining the text, and many others in this connection, see annotations under Rule 2 of Cecil v. Beaver (28 Iowa 241), ante. p. 448.

JEWETT v. HOME INSURANCE CO., 29 IOWA 562

1. Insurance Companies—Fire Insurance—Waiver of Condition as to Forfeiture, What is not.—When neither a fire insurance company nor its local agent has notice or knowledge of a breach by insured of a condition declaring a forfeiture until after a partial loss thereunder, the fact that the company failed to pay the insured the balance of the unearned premium and has the property not destroyed appraised, does not estop it from thereafter claiming and relying on the forfeiture, when sued on the policy for the loss, p. 565.

Special cross reference. For cases citing and extending the text, and many others on this question, see annotations under Rule 3 of Viele v. Germania Ins. Co. (26 Iowa 9), ante. p. 298.

CARPENTER v. WOLF, CARPENTER & ANGLE, 29 IOWA 567

1. Pleading—Demurrer—Waiver of Ruling on.—Error in the overruling a demurrer to the petition, is waived by the defendant answering over, p. 570.

Reaffirmed and extended in Phillips v. Hosford, 35 Iowa 594 (abstract), holding further that objections to the ruling upon a demurrer is waived by pleading over in conformity to the judgment of the

court upon the question presented by the demurrer; and the rule is applicable to the case where the demurrer is sustained as well as when it is overruled.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

2. Trial—Evidence—Admission of—Estoppel of Party Objecting to.—Where the court makes a rule limiting the kind of evidence to be introduced upon a jury trial, and upon the motion or suggestion of a party to the action, the latter is estopped to claim that evidence was erroneously admitted under the rule, p. 572.

Reaffirmed and extended in Trott v. Ch. R. I. & P. Ry. Co., 115 Iowa 89, 86 N. W. 33; Westbrook v. M. N. & S. Ry. Co., 115 Iowa 109, 88 N. W. 203, holding further that where a party invokes the ruling of the court upon the competency or admissibility of certain evidence, and it is rejected, he cannot, thereafter, introduce such evidence in his own behalf, or claim error when the court rejects or refuses to allow him to introduce it.

BOGGS v. CHICAGO & NORTHWESTERN R. R. Co., 29 IOWA 577

1. Trial—Separation of Jury After Final Submission—When not Cause for Reversal.—Where, after a case is finally submitted to the jury for determination and verdict, the jurors are permitted by the bailiff having them in charge, to separate for a short time and for a necessary purpose, this will not be ground for reversal upon appeal, unless the record shows that the party appealing and complaining was thereby prejudiced in his substantial rights, p. 578.

Reaffirmed and explained in Allison v. C. & N. W. R. R. Co., 42 Iowa 284, holding that the mere separation of the jury, without some showing of prejudice, will not be sufficient to set aside the verdict.

FIRST NATIONAL BANK OF CEDAR RAPIDS v. HURFORD & BRO., 29 IOWA 579

1. Railroads—Subscription to Aid in Construction of—Fraud—Evidence.—In an action to recover an amount subscribed to aid in the construction of a railroad, when the defendant pleads fraud and want of consideration, declarations of persons, not shown to be agents or authorized to act or speak for the railroad company, made at a public meeting at which the amount was subscribed, are inadmissible for the defendant, pp. 583, 584.

Distinguished in Davis & Co. v. Dumont, 37 Iowa 54, 55, a case wherein persons who obtained the benefit of a subscription to aid in the construction of a railroad were guilty of false and fraudulent representations which avoided the contract of subscription.

2. Written Contracts and Instruments—Fraud and Want of Consideration—Parol Evidence.—Parol evidence is admissible to

prove fraud in the procurement of a written contract or other instrument, or to prove want of consideration therefor, not to vary or control it, but to prove that, as between the parties, it never had a legal existence, p. 584, 585.

Reaffirmed in Bigelow v. Wilson, 87 Iowa 635, 54 N. W. 467; Hinkley v. Sac Oil & Pipe Line Co., and Petersmeyer, 132 Iowa 407, 119 Am. St. Rep. 564, 107 N. W. 623.

(Note.—There are numerous cases sustaining, but not citing, the text.—Ed.)

3. Railroads—Subscription to Aid in Construction—Consideration, Sufficiency of.—Where a subscription to aid in the construction of a railroad is conditioned upon the company laying its railroad track to a certain point, the subscription to be due thirty days after the company performs this condition, it is based upon a sufficient consideration, and the subscriber is liable after the thirty days from performance thereof by the company, p. 587.

Special cross reference. For cases citing and sustaining the text, and others in this connection, see annotations under Des Moines Valley R. R. Co. v. Graff (27 Iowa 99), ante. p. 373.

KNIGHT v. KNIGHT, 29 IOWA 599

(Abstract.)

1. Divorce—Dismissal of Wife's Petition for—Allowance to Her of Expenses of Appeal.—The district court may, upon the dismissal of a wife's petition for divorce, allow her a sum to be paid by the defendant—husband—sufficient for her to prosecute and defray the expenses of an appeal to the Supreme Court, p. 599.

Reaffirmed in Briggs v. Briggs, 36 Iowa 384.

Cited in Vanduzer v. Vanduzer, 70 Iowa 617, 31 N. W. 957, not in point.

Annotations to Decisions Reported in Volume 30 Iowa.

STEWART v. BOARD OF SUPERVISORS OF POLK COUNTY, 30 IOWA 9, 1
AM. REP. 238

1. Constitutional Law—Statutes—Legislative Powers—Power of Courts to Declare Unconstitutional, When to be Exercised.—Courts will not declare an Act of the Legislature or statute unconstitutional unless it be so clearly and palpably in violation of the Constitution as to leave no reasonable doubt thereof.

The General Assembly possesses all legislative authority *not delegated to the general government, or prohibited by the constitution*, pp. 14, 15, 18, 19.

Reaffirmed in McGuire v. Ch., B. & Q. R. R. Co., 131 Iowa 348, 349, 108 N. W. 905.

Reaffirmed as to first paragraph in City of Council Bluffs v. K. C. St. J. & C. B. R. R. Co., 45 Iowa 356, 24 Am. Rep. 773; Richmond v. Supervisors of Muscatine County, 77 Iowa 523, 14 Am. State Rep. 308, 4 L. R. A. 445, 42 N. W. 425; B. C. R. & Northern Ry. Co. v. Dey, 82 Iowa 342, 31 Am. St. Rep. 477, 12 L. R. A. 436, 48 N. W. 106.

Reaffirmed as to second paragraph in Boyer v. Kinnick, 90 Iowa, 75, 57 N. W. 691; Hawkeye Insurance Company v. French, 109 Iowa, 588, 80 N. W. 661.

Reaffirmed and explained in Shaw v. City Council of Marshalltown, 131 Iowa 136, 10 L. R. A. (New Series), 825, 9 Am. & Eng. Ann. Cases, 1039, 104 N. W. 1124, holding that the Legislature has power to legislate on all subjects, unless it is expressly or impliedly prohibited from so doing by the Constitution, and the act of the Legislature which is assailed must be plainly at variance with the Constitution before the court will so declare it; that all doubtful questions will be resolved in favor of the validity of the act.—The court upholding constitutionality of Chap. 9, Laws of Thirtieth General Assembly, granting preference in appointment to minor municipal offices to soldiers, sailors and marines from the army and navy of the United States in the late Civil War, who are residents of this state: Holding further that a public office has in it no element of property, and is not an inalienable right of the citizen; nor are the prospective emoluments of an office, property in any sense; as the salary or perquisites thereof may be reduced or otherwise regulated at any time by the Legislature, unless forbidden by the Constitution.

Unreported citation, 133 N. W. 898.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

Cross Reference.—See further on this question, annotations and cross references under *Morrison v. Springer* (15 Iowa 304), Vol. II, p. 346.

2. Constitutional Law—Power of Legislature to Authorize County or Other Municipal Corporation to Vote Tax in Aid of Railroad—Chapter 102, Acts of Thirteenth General Assembly Constitutional.—The Legislature has the power to authorize a county or other municipal corporation to vote a tax to aid in the construction of a railroad: And Chap. 102, Acts of 1870 (13th General Assembly) for such purpose, is Constitutional, pp. 11, 30.

Reaffirmed in *McGregor, and Sioux City R. R. Co. v. Birdsall*, 30 Iowa 257; *Jordan v. Hayne*, 36 Iowa 18.

Reaffirmed in *Bennifield v. Bidwell*, 32 Iowa 150, 151, upholding constitutionality of Chapter 48, Acts of 1868, for the same purpose as the act set out in the text.

Reaffirmed in *Renwick, Shaw & Crossett v. Davenport & N. W. Ry. Co.*, 47 Iowa 511, 512, upholding constitutionality of Chap. 123, Acts of 1876 (16th Gen'l Assembly), for the purpose set out in the text.

Reaffirmed in *Ch., M. & St. P. Ry. Co. v. Shea*, county treasurer, 67 Iowa 729, 25 N. W. 901, upholding constitutionality of Chap. 123, Acts of 1876 (16th Gen'l Assembly), as amended by Chap. 173, Acts of 1878 (17th Gen'l Assembly), for the purpose of the text.

Reaffirmed and varied in *Pritchard v. Magoun*, 109 Iowa 366, 46 L. R. A. 381, 80 N. W. 513, the court upholding the constitutionality of Chap. 13, Acts of 1886 (21st Gen'l Assembly), as amended by Chap. 19, Acts of 1894 (25th Gen'l Assembly), and Chap. 98, Acts of 1886 (21st Gen'l Assembly), authorizing cities and towns to vote a tax to aid in the construction of certain highway bridges owned by private persons or corporations.

Cited in *First Nat'l Bank of Cedar Rapids v. Hendrie*, 49 Iowa 404, 31 Am. Rep. 153, the case involving another, but analogous question.

Cited in *Barnes v. Marshall County*, 56 Iowa 24, (dissenting opinion), 8 N. W. 679, the majority court opinion not in point, but on a kindred question.

Cited in *Muscatine R. R. Co., v. Horton*, 38 Iowa 48, involving and turning on other points.

Cited in *Koehler & Lange v. Hill*, 60 Iowa 663, (dissenting opinion), 15 N. W. 639, the majority court opinion not in point.

Cross reference. See further on this question annotations under Rule 1 of State ex rel. B. & M. Riv. R. R. Co. v. Wapello County (13 Iowa 388), Vol. II, p. 165.

3. Constitutional Law—Eminent Domain—Legislative Powers Railroad Right of Way.—The Legislature may authorize the taking of private property for a public use, or for a use which will be of ben-

efit to the public, upon the owner being compensated therefor. And this rule applies where the Legislature so authorizes private property to be taken for a railroad right of way, pp. 20-23.

Reaffirmed and extended in Noll v. Dubuque, B. & M. R. R. Co., 32 Iowa 67, 70, holding further that where land is acquired by a railroad, for its right of way under the general act authorizing it, it takes by grant from the State: And that, therefore, the Legislature may, upon the company failing to construct, or to operate its road, within a given time, transfer the easement to another company, upon compensation being made to the first company: And that this is the object of Chap. 91, Acts of 1870 (13th Gen'l Assembly).

Reaffirmed and extended in C. M. & St. P. Ry. Co., v. Starkweather, 97 Iowa 161, 59 Am. St. Rep. 404, 31 L. R. A. 183, 66 N. W. 88, holding further that a city may extend a street across the depot grounds of a railroad company, where it does not interfere with the use for railroad purposes, and upon statutory procedure, and assessment of damages to such company.

4. Constitutional Law—Legislative Powers—Power to Tax.—

The power to tax is one of the sovereign powers vested in the General Assembly, and it is not limited by the constitutional provision requiring compensation to the owner for property taken for public use; and courts shall not so limit it, pp. 26, 27.

Reaffirmed in Yeomans v. Riddle, 84 Iowa, 161, 50 N. W. 890, holding that the assessment and levy of taxes and assessments in accord with law, by proceedings wherein are provisions for an appeal, or other means of correcting any error, illegality, or want of authority, is not in conflict with the provision of the constitution against the deprivation of property without due process of law.

Reaffirmed and explained in Iowa R. R. Land Co. v. Soper, 39 Iowa 123, 124, holding that the sovereign power to tax of the General Assembly is exercised by that body without the aid of the courts, except where the assistance of the latter is called for in the collection of revenue.

Reaffirmed and qualified in City of Davenport v. C. R. I. & P. R. R. Co., 38 Iowa 642, 643, 647, 648, holding that the General Assembly possesses general legislative power to subject all kinds and classes of property, both of individuals and private corporations, to taxation: But that, under Art. 8 of the Constitution, Chap. 26, Acts of 1872 (14th Gen'l Assembly), releasing railroad companies that have paid taxes on their gross earnings as provided by Chap. 100, Acts of 1870 (13th Gen'l Assembly), from certain municipal taxation, is unconstitutional.

Cited in Renwick, Shaw & Crossett v. Davenport & N. W. Ry. Co., 47 Iowa 513, 514 (dissenting opinion), the majority court opinion reaffirming Rule 2 hereof.

5. Constitutional Law—Legislative Powers, How Limited by.—The powers of the General Assembly viewed in the light of the Constitution, are to be construed by the *limits or restrictions* therein, either expressly or necessarily implied, and not by the powers conferred by that instrument upon it. The Legislature wherever not so limited or restricted, has power to pass laws on any question whatsoever, p. 18.

Reaffirmed in Eckerson v. City of Des Moines, 137 Iowa 465, 115 N. W. 182.

6. Constitutional Law—"Due Process of Law" Defined.—"Due process of law" as used in Sec. 9 of the Bill of Rights of our Constitution, means ordinary judicial proceedings in court, p. 28.

Reaffirmed in Eikenberry & Co. v. Edwards, 67 Iowa 626, 56 Am. Rep. 360, 25 N. W. 835, holding that the term "Due process of law" means the ordinary judicial proceedings recognized by law, and provided for determining the rights of property and for subjecting the citizen to deprivation of his liberty for violation of the law.—The court upholding the constitutionality of Sec. 3145 of the Code of 1873, in reference to the examination of a judgment debtor for purposes of discovery, and his punishment for contempt under the provision thereof.

JAMES v. SMITH, 30 IOWA 55

1. Negotiable Promissory Note—Indorsement in Blank—Parol Evidence as to Agreement of Indorsement.—In an action by the indorsee of a negotiable promissory note against the blank indorser thereof, the plaintiff may show by parol evidence, the actual contract of indorsement, pp. 56, 57.

Reaffirmed in First National Bank v. Crabtree, 86 Iowa 734, 52 N. W. 561.

Reaffirmed and explained in Farmers' Savings Bank v. Hansmann, 114 Iowa 51, 52, 86 N. W. 32, holding that a blank indorser of a negotiable promissory note, and one who transfers it by writing his name on the back thereof, may, when sued thereon by the indorsee, prove by parol that such indorsement was without consideration.

Reaffirmed and extended in Preston v. Gould, 64 Iowa 47, 48, 19 N. W. 835, holding further that in an action by one blank indorser against another blank indorser of a negotiable promissory note, the plaintiff may plead, and prove by parol, that he was in fact a surety for the defendant; and may recover the amount of the note he was forced to pay to the indorsee.

Cross reference.—See further on this question annotations under Harrison v. McKim (18 Iowa 485), Vol. II, p. 671.

SHEA v. QUINTIN, 30 IOWA 58

1. Actions—Defective Notice—Justice's Courts—When Judgment by Default in to be Corrected on Motion or Appeal—Injunction.—A judgment in a justice's court will not be set aside as void and its collection enjoined in an action in equity therefor, because of defective or insufficient notice or its service; but in order for such relief to be obtained there must be an entire want of notice. Such a judgment rendered upon defective or insufficient notice or its service, must be corrected by motion or by appeal.

So such equitable relief will not be granted against such a judgment entered by default upon a notice which was not served the required length of time, p. 59.

Reaffirmed in Darrah v. Watson, 36 Iowa 119.

Reaffirmed and explained in Dougherty v. McManus, 36 Iowa 659, holding that a judgment rendered by default in a justice's court upon an insufficient notice must be corrected by writ of error or by appeal as provided by law, and will not be set aside or enjoined in equity.

Reaffirmed and explained in Bennett v. Hetherington, 41 Iowa 150; Woodbury v. McGuire, 42 Iowa 342; Wilson & Co. v. Call, 49 Iowa 465, 466; Blair v. Wolf, 72 Iowa 248, 33 N. W. 670, holding that in order for a judgment to be void and subject to collateral attack by reason of the manner, time or defects of notice, the service or notice, must be such as to amount to *no notice*, as other defects in relation thereto must be corrected by motion and appeal.

Reaffirmed and explained in Schneitman v. Noble, 75 Iowa 122, 123, 9 Am. St. Rep. 467, 39 N. W. 325, holding that if it appears that there was a notice in an action, although it was defective, or that the service thereof was imperfect, and that either or both failed to comply strictly with the statute, and that the court determined the sufficiency thereof, which is shown upon the record, the judgment rendered thereon will not be held void upon collateral attack: That if such determination be erroneous, it should be corrected by appeal, and cannot be reserved as a ground of attack upon the judgment in a collateral proceeding.

Reaffirmed and extended in Fanning v. Krapfl, 68 Iowa 248, 249, 26 N. W. 135, holding further (in a case involving a judgment in the District Court), that when the record shows that an affidavit as to service of notice by publication was filed, and thereafter a judgment was entered, that the subsequent entry of the judgment necessarily involved the sufficiency of the affidavit, and the judgment cannot be collaterally attacked for insufficiency of the affidavit.

Reaffirmed and varied in Shuver v. Klinkenberg, 67 Iowa 546, 547, 25 N. W. 771, holding that where, before the commencement of an action of forcible entry and detainer, the landlord gives the tenant

at will more than three days notice as required by Sec. 3614 of the Code of 1873, the defendant (tenant at will) cannot set aside a judgment by default in such action on such ground.

Cited in Koehler & Lange v. Hill, 60 Iowa 577 (dissenting opinion), 14 N. W. 755, the majority court holding that when a subsequent General Assembly decides and enacts that a prior one did not do that which the records of the prior shows was done, such subsequent determination is void and binding upon no one.

Distinguished in Haws v. Clark, 37 Iowa 357, 358, holding that when the notice served in an action or proceeding lacks some essential requirement, such as to make it amount to *no notice*, the judgment and all proceedings had thereunder are void, either on direct or collateral attack: Hence holding that where a notice in a proceeding by a guardian in the county court to sell land of a minor fails to notify him to appear on a regular term-day of court, but fixes a day other than a term-day, it amounts to *no notice*, and the judgment, orders and proceedings had thereunder are void.

Distinguished and narrowed in Bradley v. Jamison, 46 Iowa 71, 72, holding that when the notice in an action is served by publication, the record must show that all the requirements of the statute were strictly complied with, or the court will have no jurisdiction, and a judgment rendered thereunder will be void, and subject to attack both directly and collaterally.

Unreported citation, 133 N. W. 665; 134 N. W. 735.

Cross references. See further on this question, annotations under *Shawhan v. Loffer* (24 Iowa 217), ante. p. 176; *Kitsmiller v. Kitchen* (24 Iowa 163), ante. p. 158; Rule 1 of *Ballinger v. Tarbell* (16 Iowa 491), Vol. II, p. 462.

STILES & WINTER v. ESTATE OF BOTKIN, 30 IOWA 60

1. Appeal—Motion for New Trial Shown to Have Been Made After Expiration of Three Days—Conclusiveness—Correction of Mistake in Record, Motion for.—Where, upon appeal to the Supreme Court the record shows that a motion for a new trial required by Sec. 3114 of the Code of 1860 to be made within three days after verdict, was made after the expiration of that period, the recitals of the record will be taken as conclusive on the question.

Any correction of a mistake in the recitals of a record in such case must be made by the court below, by proper proceedings, p. 61.

Reaffirmed as to first paragraph in Riegelman & Co. v. Todd, 77 Iowa 697, 698, 42 N. W. 518.

Reaffirmed as to second paragraph in Campbell v. Campbell, 118 Iowa 132, 91 N. W. 894.

STURDEVANT v. NORRIS, 30 IOWA 65

1. Dower—When Becomes Vested Right—Power of Legislature to Change, etc.—The wife is entitled to dower in her husband's real estate according to the law in force at his death.

The dower of the wife becomes a vested right upon the death of her husband; and until such time it is inchoate only, and the Legislature may enlarge, abridge or entirely take it away.

The law acts upon the status of the parties at the time of the husband's death, when the dower interest, if any, vests, and upon the property in which her husband during the coverture had a legal or equitable interest, in which she has not relinquished her rights, or in which her rights have not been extinguished in the manner provided by law, pp. 69-71.

Reaffirmed in Parker v. Small, 55 Iowa 733, 8 N. W. 663; Cunningham v. Wilde, 56 Iowa 369, 370, 9 N. W. 304; Byington v. Carlin, 146 Iowa 304, 125 N. W. 235.

Reaffirmed and qualified in Moore v. Kent, 37 Iowa 22, 23, 25, 18 Am. Rep. 1, holding that where a husband during life conveys real estate, in which instrument the wife does not join, she is entitled to dower in such property after his death according to the law in force at the time of the execution of such conveyance by her husband.

Cross References. See Rule 2 hereof, in this connection. See further, annotations under Lucas v. Sawyer (17 Iowa 517), Vol. II, p. 564.

2. Dower—Divesting of by Judicial Sale—Sale under Trust Deed Divests.—The dower interest of the wife in land of her husband is divested by a judicial sale thereof before his death.

Where, also, a wife joins her husband in a mortgage or trust deed on or to his land, a sale under the instrument, or under foreclosure thereof, divests her of dower interest therein, p. 69.

Reaffirmed and extended in Stidger v. Evans, 64 Iowa 92, 93, 19 N. W. 851, holding further that a sale and conveyance of land of the husband, and during his lifetime, by his assignee under an assignment for benefit of creditors, divests the wife of dower therein.

Reaffirmed and extended as to first paragraph in Bowden v. Hadley, 138 Iowa 716, 116 N. W. 690, holding further that a judicial sale of a husband's land during his lifetime, divests his wife of dower therein; and that she cannot sue to set aside such a sale as void.

Reaffirmed and extended as to first paragraph in Lucas v. Purdy, 142 Iowa 360, 361, 369, 19 Am. & Eng. Ann. Cases 974, 120 N. W. 1064, holding further that a valid sale of a husband's land for taxes, made during his lifetime, and deed executed by the county treasurer thereunder, divests the wife of her inchoate right of dower therein.

Reaffirmed and extended as to second paragraph in Pierce v. O'Neil, 132 Iowa 530, 531, 109 N. W. 1083, holding further that a

sale of a husband's land, during his lifetime, under his trust deed securing a debt, and in which his wife did not join, divests her of dower therein.

CHICAGO ROCK ISLAND & PACIFIC R. R. Co., *v.* HURST, 30 IOWA 73

1. Eminent Domain—Railroad Right of Way—Joint Assessment of Damages to Two Owners of Land—Appeal by One—Practice.—Where, in a proceeding to condemn land for a right of way of a railroad, damages are assessed jointly to two owners of land, leaving them to determine in a proceeding between themselves to what portion thereof each was entitled, an appeal cannot be prosecuted by one of the owners, without the other either joins therein, or is made a party thereto, pp. 74, 75.

Reaffirmed and varied in C. R. I. F. & N. W. Ry. Co. *v.* C. M. & St. P. Ry. Co., 60 Iowa 36, 37, 14 N. W. 77, holding that an appeal cannot be prosecuted by a land owner *from part of an entire* assessment of damages for a railroad right of way.

Cited in Hall *v.* Wabash Ry. Co., 141 Iowa 253, 119 N. W. 928, the case turning on other points.

Distinguished and narrowed in Ruppert *v.* C. O. & St. J. R. R. Co., 43 Iowa 492, holding that where damages for a railroad right of way are jointly assessed to two persons, each of whom owns one-half of the land, and one of them thereafter accepts one-half the sum of the damages and executes a deed to a right of way over the land, the other owner may subsequent to such transaction prosecute an appeal for the purpose of having another trial of the amount of his one-half of the damages.

Distinguished and narrowed in Lance *v.* C. M. & St. P. R. R. Co., 57 Iowa 637, 11 N. W. 612, holding, that where damages for the right of way of a railroad are assessed jointly to the owner of the land and one who holds a mortgage thereon, the land owner may appeal, and have another assessment of damages without the mortgagee joining therein, or being made a party thereto.

HAYES *v.* RITCHEY, 30 IOWA 76, 6 AM. REP. 642

1. Slander and Libel—Imputing Sodomy to Female—Words Actionable *per se*.—Words imputing the crime of sodomy to a female, are actionable *per se*, p. 77.

Reaffirmed and explained in Cushing *v.* Hederman, 117 Iowa 638, 94 Am. St. Rep. 320, 91 N. W. 941; Charleston *v.* Russell, 144 Iowa 40, 121 N. W. 532, holding—as does the present case in argument—that words imputing a want of chastity to a female, are slander *per se*.

Cross Reference. See further on this question, annotations and cross reference under Cleveland *v.* Detweiler (18 Iowa 299), Vol. II, p. 635.

KESEE v. CHICAGO & NORTHWESTERN R. R. Co., 30 IOWA 78, 6 AM. REP. 643

1. Trial—Evidence—Order of Introduction of Evidence and Limiting Number of Witnesses on Points—Discretion of Trial Court—Abuse of—Reversal.—The trial court has a sound judicial discretion on the matters of the order of introduction of evidence and the limiting of the number of witnesses that may be introduced on a given point; and his ruling on such a question will not be ground for reversal, except in case of a manifest abuse of such discretion, p. 80.

Reaffirmed in Everett v. Union Pacific R. R. Co., 59 Iowa 244 (cited in dissenting opinion 248), 13 N. W. 109, 111; Minthon v. Lewis, 78 Iowa 623, 43 N. W. 467; Preston v. City of Cedar Rapids, 95 Iowa 73, 74, 63 N. W. 578.

(Note.—There are cases sustaining, but not citing the text.—Ed.)

2. Railroad Companies—Liability for Property Destroyed by Fire Set by Engine.—A railroad company is liable in damages for property (in this case hay stacks) destroyed by fire caused by sparks from its engine which set fire to dry grass and weeds on its right of way, if the company failed to exercise the care which a cautious and prudent, or ordinarily prudent, man under similar circumstances would have exercised to prevent the accumulation of such grass and weeds, pp. 80, 82.

Reaffirmed and explained in McCormick v. C. R. I. & P. R. R. Co., 41 Iowa 196, holding, that in such a case the question of the railroad company's negligence is to be determined by the jury from the facts proved.

3. Railroad Companies—Liability for Property Destroyed by Fire Set by Engine as Set Out in Rule 2 Above—Contributory Negligence of Property Owner.—Although a railroad company may be guilty of negligence as set out in Rule 2 hereof, and stacks of hay (or other property) on adjoining land are thereby destroyed from a fire started as therein stated, still if the owner of the hay (or other property) failed to exercise ordinary prudence to protect it from such fire, such as plowing around the stacks or other precaution, he will be guilty of such contributory negligence as will prevent him recovering therefor, pp. 82, 84.

Reaffirmed in Small v. C. R. I. & P. R. R. Co., 50 Iowa 347.

Reaffirmed and explained in Garrett v. Ch. & N. W. Ry. Co., 36 Iowa 123, 124; McCormick v. Ch. R. I. & P. R. R. Co., 47 Iowa 347, 348; Slossen v. B. C. R. & N. R. R. Co., 60 Iowa 221, 222, 14 N. W. 247, holding that in the case set out in the text, the question of whether or not the plaintiff (owner of the property destroyed) was guilty of such contributory negligence, is one of fact for the jury to determine.

Cited in Carlin v. Ch. R. I. & P. R. R. Co., 37 Iowa 322; Artz v. Ch. R. I. & P. R. R. Co., 38 Iowa 297, being actions for personal injuries by reason of the negligence of railroad companies, and stating the doctrine of contributory negligence in such cases.

Cited in Ormond v. Cent. Iowa Ry. Co., 58 Iowa 743, 13 N. W. 55, the case turning on other points.

Cited in Richardson & Bell v. Douglas, 100 Iowa 244, 69 N. W. 532, not in point; but being an action for damages for the destruction of wheat caused by a defective threshing machine.

Overruled in West v. Ch. & N. W. Ry Co., 77 Iowa 656, 35 N. W. 481, holding that under Sec. 1289 of the Code of 1873, when property is destroyed by a fire caused by the negligence of a railroad company in the operation of its train, or by its engine, the owner may recover of the company therefor, although he was guilty of contributory negligence.

CLINTON NATIONAL BANK v. TORRY, 30 IOWA 85

1. Written Instruments—Promissory Notes—Genuineness of Signature of Maker—Evidence of, When Not Required.—In an action on a promissory note the plaintiff is not required to prove the genuineness of the signature of the maker, when such fact is not denied or put in issue, p. 88.

Reaffirmed and explained in Douglass v. Matheny, 35 Iowa 113, holding that in an action on a promissory note in order—under Sec. 2967 of the Code of 1860—to cast upon the plaintiff the burden of proving the genuineness of the signature of the note sued on, the genuineness of such signature must be denied in writing under oath by the defendant.

Cross reference. See further on this question, annotations under Rule 1 of Hall v. Ætna Mfg. Co. (30 Iowa 215), *Infra* p. 587.

OLIVER v. BASS, 30 IOWA 90

1. Actions—Venue—Contracts, Actions on.—Under Sec. 2798 of the Code of 1860, an action for breach of contract, when the contract expressly provides that it is to be performed in a particular county may be brought in that county, although it be not the county of defendant's residence.

So an action for breach of a written contract by failing to deliver personal property purchased, at a particular place and county as expressly provided by the contract, may be brought in the county where it was to have been delivered.

Reaffirmed as to first paragraph in Hangen & Co. v. McCarney, 34 Iowa 417, 418.

Reaffirmed as to first paragraph in Sanbourn v. Smith & White, 44 Iowa 154, under Sec. 2581 of the Code of 1873, corresponding to the section of the text.

Reaffirmed and explained in School District of Mason City v. Reichard, 39 Iowa 170, holding that an action on a bond, the covenants of which were not to be performed in any specified place, must be brought in a county wherein some of those who executed it reside.

Cross Reference. See further on this question, annotations under Hunt v. Bratt (23 Iowa 171), ante. p. 92.

JEWETT v. SQUIRES, 30 IOWA 92

1. **Injunction—Dissolution of by Circuit Judge—Appeal.**—Under Chap. 86, Acts of 1868 (12th General Assembly) creating the Circuit Court, an appeal lies to the Supreme Court from an order of the Circuit Court, made while court is in session, dissolving an injunction, but not when the order is made in vacation or in chambers, p. 94.

Cited in In re Curley, 34 Iowa 189, the court holding that an appeal can only be taken when allowed by law; and that an appeal does not lie in a *Habeas Corpus* proceeding had before a judge of the Superior or Circuit court, it not being allowed by law.

Overruled in Bennett v. Hetherington, 41 Iowa 149, holding that under Secs. 3163-3165 of the Code of 1873, an appeal lies to the Supreme Court from an order of *any judge* allowing or refusing to allow an injunction.

COOK v. CITY OF BURLINGTON, 30 IOWA 94, 6 AM. REP. 649

(Later Appeal, 36 Iowa 357.)

1. **Municipal Corporations—Streets, Alleys, etc.—City of Dubuque—Act of Congress of July 2, 1836, Construed—Accretions to Street in That City—Railroad Right of Way Granted by.**—By laying off the land on which the city of Dubuque is located into lots, streets, avenues, public squares and out-lots, according to the provisions of the acts of Congress of July 2, 1836, and March 3, 1837, and as represented upon the plat returned to the General Land Office, and by the sale of lots to the occupants thereof and to other purchasers, the streets, etc., of the city were dedicated to public use, in such sense that the General Government as the owner, is forever precluded from exercising authority or claiming title to any of such realty, streets, etc., and they are held by the city in trust for the public, and for public use.

Where accretions are caused by a river to the soil of a street in such city (Dubuque) it is held by the city for public use and cannot be conveyed for private purposes.

But a railroad company may be granted a right of way by the city over such land acquired by accretions, and without compensating abutting lot owners for damages thereby occasioned, pp. 98-100, 105.

Reaffirmed as to first paragraph in Snyder v. Fort Madison Street Ry. Co., 105 Iowa 286, 41 L. R. A. 345, 75 N. W. 180.

Reaffirmed and extended in Burlington Gas Light Co. v. B. C. R. & N. Ry. Co., 91 Iowa 472, 59 N. W. 293, holding further that land reserved along the river front in Burlington, by the act set out in the text, may be used for the right of way of a railroad company by consent of the city.

Reaffirmed and extended as to last paragraph in Ingraham, Kennedy & Day v. Ch. D. & M. R. R. Co., 34 Iowa 252, holding that under the statute law of this state a railroad company has a right to construct its railroad upon and over the streets and alleys of a city, upon obtaining authority from the city so to do; and the construction thereof is not a nuisance, and will not be enjoined, at the instance of the owners of lots abutting thereon: And that the fact that land which is part of a street, or which lies between a street and a navigable slough, separates a lot from such slough, does not give the lot owner the right to enjoin the construction of a railroad thereon, when it is being done with the consent of the city.—And to the same effect is Davis v. C. & N. W. R. R. Co., 46 Iowa 394-397 (Citing the text on page 395), holding further that where a city constructs a railroad track along the street of a city according to the provisions of the statute, its laying an additional track thereon is not, of itself, a nuisance.

Reaffirmed and varied as to second paragraph in Sioux City v. Ch. & N. W. R. R. Co., 129 Iowa 703, 704, 113 Am. St. Rep. 501, 106 N. W. 187, holding that where land is dedicated by a plat of a city as depot grounds, and is used thereafter as such by the railroad company to whom it is so dedicated, land gained by accretion thereto and reclaimed by the company, belongs to it, and not to the city.

Cited in Bennett v. National Starch Mfg. Co., 103 Iowa 211, 72 N. W. 508, the court holding that a riparian owner of land on a navigable river owns to high-water mark, that is to the edge of the bank: That a riparian owner of land outside of a city, has the right to construct, below high-water mark, bridge piers and landings, and to reclaim the soil, conforming to state regulations and not obstructing navigation; but that these rights depend upon and are appurtenant to the adjacent soil, and are not the subject of sale, except by sale and conveyance of the land along the navigable stream.

Cited in City of Keokuk v. Cosgrove, 116 Iowa 193, 89 N. W. 98, the court holding that lot owners in a city or town who purchased from one who has dedicated public squares, streets, alleys, etc., by a plat thereof, and who purchase their lots in reference to such plat, have a vested right to the use of such public property as shown by the plat of dedication, of which they cannot be deprived by the act of their vendor (the dedicator) or any one claiming through him.

Cited as to last paragraph in Board of Park Commissioners of City of Des Moines v. The Diamond Ice Co., 130 Iowa 608, 3 L. R. A. (New Series) 1103, 8 Am. & Eng. Ann. Cas. 28, 105 N. W. 205, the court holding that the substitution of one public use to the exclusion

of other public uses in a statute is not an invasion of the right of property within the meaning of either the State or United States Constitutions—the court upholding constitutionality of Chap. 179, Acts of 1900 (28th General Assembly) granting certain powers, etc., to the Board of Park Commissioners of the City of Des Moines.

Cited in C. M. & St. P. Ry. Co. v. Starkweather, 97 Iowa 161, 59 Am. St. Rep. 404, 31 L. R. A. 183, 66 N. W. 88, the case turning on another question.

Cited in Diamond Jo Line Steamers v. City of Davenport, 114 Iowa 439, 87 N. W. 402, 54 L. R. A. 859, the case involving another question.

Cross References. See further on this question, annotations under Milburn v. City of Cedar Rapids et al (12 Iowa 246), Vol. II, p. 40; City of Dubuque v. Maloney (9 Iowa 450), Vol. I, p. 606.

2. Municipal Corporations—Dedication of Land to Public Use—Diverting by City from Use for Which Dedicated—Rights and Remedies of Dedicator and Abutting Lot Owners—Injunction.—Injunction lies in favor of the dedicator, or of the owners of an abutting lot to restrain a city from diverting land dedicated to a public use from that for which it was dedicated, or from conveying it for other purposes, pp. 101, 102, 106.

Reaffirmed and explained in Snyder v. Ft. Madison Street Ry. Co., 105 Iowa 286, 41 L. R. A. 345, 75 N. W. 180, holding that injunction lies upon complaint of an owner of a lot abutting a street to compel a street railway company to remove an electric light pole so placed as to necessarily injure and annoy the lot owner.

Reaffirmed, explained and qualified in Pettigill v. Devin, 35 Iowa 355, holding that land dedicated to a city for a particular use, can be used for it only; and the dedicator, and even an abutting lot owner may enjoin and restrain a diversion to any other use or purpose resulting in injury to him; but that if such land is so diverted, it does not thereby revert to the dedicator.

Reaffirmed and extended in Cadle v. Muscatine Western R. R. Co., 44 Iowa 14, holding further that an abutting lot owner may recover damages of a railroad company for its wrongfully or negligently constructing or locating its track along a street.

Reaffirmed and varied in Long v. Wilson, 119 Iowa 269, 273, 274, 97 Am. St. Rep. 315, 60 L. R. A. 720, 93 N. W. 282, 284, holding that injunction lies in favor of an abutting lot owner to enjoin and restrain another from interfering with his free access and use of the street, or to prevent its obstruction; and that such lot owner is not bound by a decree in an action to which he was not a party concerning the subject-matter.

Reaffirmed and varied in State ex rel. Fullerton v. Des Moines City Ry. Co., 135 Iowa 714, 109 N. W. 875, holding that an abutting lot owner may, under Title 21, Chap. 9 of the Code of 1897, proceed

by *Quo Warranto* to test the right of a city railway to use a street, when the county attorney upon demand neglects or refuses to commence the proceedings.

Cited in Tomlin v. D. B. & Miss. R. R. Co., 32 Iowa 114, 115 (dissenting opinion), 7 Am. Rep. 176, the majority court holding that the owner of land along the bank of a navigable river is entitled to no compensation for damages occasioned by being deprived of free access thereto, by reason of the construction of a railroad between high and low water-marks.

Distinguished and narrowed in Williams v. Carey, Mayor, 73 Iowa 196, 197, 34 N. W. 814, holding that injunction will not lie in favor of an abutting owner against a city to prevent it from vacating twelve feet of a street, where the street so vacated or narrowed is forty-one feet wide, and no material damage is shown as resulting to such abutting lot owner.

Distinguished and narrowed in McLaughlin v. Town of Gray, 105 Iowa 262, 74 N. W. 774, holding that in the absence of fraud or bad faith, injunction does not lie in favor of an abutting lot owner to restrain a city from vacating a part of a highway within its limits; that in such case the lot owner's remedy is by *Certiorari*.

Cross Reference. See further on this question, annotations under Warren v. Mayor of Lyons City (22 Iowa 351), ante. p. 39.

ANDRE v. CHICAGO & NORTHWESTERN R. R. Co., 30 IOWA 107

1. Railroad Companies—Liability of for Injury to or Killing Stock.—It is the duty of a railroad company to fence its right of way which runs parallel to or as it approaches a highway crossing and to erect cattle guards at the crossing, when it is "fit and proper and suitable, and does not inconvenience" the public, failing which it is liable under Chap. 169, Acts of 1862 (9th General Assembly) for injury to or the killing of stock at any such place: And in such case the question of whether or not the injury or killing occurred at a place where it was "fit, proper and suitable" for the company to fence, as before set out, should be submitted to the jury, pp. 109, 110.

Reaffirmed in Craig v. Wabash R. R. Co., 121 Iowa 476, 477, 96 N. W. 967.

Reaffirmed in Sarver v. C. B. & Q. R. R. Co., 104 Iowa 61, 62, 73 N. W. 498, under Sec. 1289 of the Code of 1873, the law of the text.

Reaffirmed, explained and extended in Clary v. Iowa Midland R. R. Co., 37 Iowa 348, 349, holding that under the law of the text it is lawful and railroad companies have a right to fence their roads, and their absolute liability attaches for stock killed or injured, at any point on the line of their road where it is not fenced, except at crossings of streets and highways, and on depot grounds: And holding further that under Sec. 1, Chap. 79 Laws of 1868, a railroad company

running and operating its cars under a lease is absolutely liable, to the same extent for stock killed or injured by its trains at points on the road where it was lawful to fence and where no fences had been erected, as if it owned the road; and it cannot relieve itself of this liability by a private contract with the lessor of the road.

Cross Reference. See further on this question, annotations under *Davis v. B. & M. Riv. R. R. Co.* (26 Iowa 549) ante. p. 361.

2. Practice—Motion in Arrest of Judgment—For What Not Allowed.—The fact that the petition in an action against a corporation fails to aver its corporate character or to describe it as a corporation, cannot be made the ground for a motion in arrest of judgment, p. 110.

Reaffirmed and explained in *Calnan Construction Co. v. Brown*, 110 Iowa 39, 81 N. W. 163, holding that such a defect in the petition is ground for demurrer; but an objection on account thereof comes too late after judgment.

BARNES v. GREENE, 30 IOWA 114

1. Actions—Tender in—Sufficiency of—Costs.—In order—under Sec. 1818 of the Code of 1860—for the defendant to make a tender in an action effective and save costs being adjudged against him, he must not only tender and offer to pay to plaintiff the sum which he (defendant) claims to be due, but he must, also, tender and offer to pay the amount of the costs which have accrued to the time of the tender, pp. 114, 115.

Reaffirmed in *Young v. McWaid*, 57 Iowa 102, 10 N. W. 291; *Martin v. Whisler*, 62 Iowa 417, 17 N. W. 594, under the Code of 1873.

WILKINSON v. CONNECTICUT MUTUAL LIFE INS. CO., 30 IOWA 119, 6 AM. REP. 657

1. Insurance Companies—When Statements in Application for Policy Deemed Warranties—Forfeiture of Policy for—Construction of Application and Policy.—Where a policy of life insurance provides that the policy is issued “upon the faith of the statements in the application” and that if they “shall be found in any respect untrue” the policy shall be void, one of the questions of the application, which was answered in the negative, being “has the party ever met with any accidental or serious personal injury?” then in an action on such policy where the jury return a special verdict finding, among other things, that the insured had not, before the issuance of the policy, met with any serious personal injury, but had fallen from a tree, and was sick for a time in consequence, but that such fall caused no permanent injury or disease, the plaintiff is entitled to recover.

The language of the question in the application (as to accidental or serious personal injury) must have a reasonable construction, in

view of the purposes for which it was asked, and has reference to such accidental injury as probably would or might possibly have influenced the subsequent health or longevity of the insured, pp. 125-127.

Reaffirmed and explained in Sargent v. Modern Brother of America, 148 Iowa 607, holding that in the absence of statute a misrepresentation by an applicant for insurance may by the terms of the contract of insurance be made a warranty in such sense that a false statement will render the contract void, although the injury in response to which the statement is made is not as to a matter strictly material to the individual risk and the death did not result from any of the matters as to which there was a false statement; but that in the interpretation of the language used in calling for answers and in making response to such inquiries, the courts insist upon a reasonable or even a liberal construction in favor of the assured, with a view to avoiding forfeitures on purely technical grounds.

Distinguished and narrowed in Miller v. Mutual Benefit Ins. Co., 31 Iowa 232, 236-238, 7 L. R. A. 122, holding that when insurer at the time of issuing a policy of insurance, knows that the statements made in the application therefor, or in statements of other persons accompanying it, are false, it (the insurer) cannot thereafter rely upon the condition in the application warranting them to be true, to defeat or avoid the policy.

Distinguished and narrowed in Peterson v. Des Moines Life Ass'n, 115 Iowa 670-672, 87 N. W. 398, 399, holding that although an application for membership in a mutual insurance company contains a stipulation on the part of the assured that all statements written therein and those made to the medical examiner in the second application above referred to are warranted to be true, and to be full and fair answers to the questions, yet under Sec. 1812 of the Code of 1897, where the company's medical examiner or physician acting as such under the rules and regulations of the company, reports the applicant to be a fit subject for insurance, the company "shall be thereby estopped from setting up in defense of the action on said policy * * * that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the same was procured through the fraud or deceit of the assured"; and that this fraud or deceit must be practiced on the medical examiner, and does not include other fraud in procuring the policy: And holding further that the term "medical examiner" includes any physician who examines an applicant for insurance and makes the certificate of health on which the company acts in issuing the policy.

Unreported Citation, 127 N. W. 55.

(Note.—See further, Nelson v. N. Life Ins. Co., 110 Iowa 600, 81 N. W. 807; Stewart v. Eq. Mut. L. Ass'n, 110 Iowa 528, 81 N. W. 803; Weimer v. Economic L. Ass'n, 108 Iowa 451, 79 N. W. 123; Meyer v. Fidelity & Cas. Co., 96 Iowa 378, 65 N. W. 328, 59 Am. St.

Rep. 374; *Seiverts v. Nat'l Benefit Ass'n*, 95 Iowa 710, 64 N. W. 671, some important cases on this question not citing the text.—Ed.)

Cross Reference. See further on this question annotations under *Stout v. City F. Ins. Co.* (12 Iowa 371), Vol. II, p. 62. See, also, in this connection, *Blumenthal v. Berkshire L. Ins. Co.*, 104 Am. St. Rep. 604; *Franklin L. Ins. Co. v. Galligan*, 100 Am. St. Rep. 73; *Haun v. Nat'l Union*, 37 Am. St. Rep. 365; *Alabama Gold L. Ins. Co. v. Johnson*, 59 Am. Rep. 816.

WEATHERBY *v.* SMITH, 30 IOWA 131, 6 AM. REP. 663

1. Mortgage—Stipulation as to Payment of Attorney's Fee in Case of Foreclosure, Not Usurious.—A stipulation in a mortgage for the payment of an attorney's fee in the event that default should be made in the payment of the notes and a suit to foreclose should be instituted, is not an usurious contract, p. 132.

Special Cross Reference. For cases citing and sustaining the text, and others, see annotations under *Nelson v. Everett* (29 Iowa 184) ante. p. 513.

WALSH *v.* ÆTNA LIFE INS. CO., 30 IOWA 133, 6 AM. REP. 664

1. Insurance Policies—Waiver by Company of Condition Allowing Forfeiture—How Done.—A condition in a life insurance policy providing for forfeiture in case the insured does a certain act, may be waived by the insurer or its agents doing such acts as induce the insured to believe that the condition is dispensed with or waived, and the policy is still valid and in force, p. 142.

Reaffirmed in *Kimbrow v. New York Life Ins. Co.*, 134 Iowa 93, 12 L. R. A. (New Series), 421, 108 N. W. 1028.

Reaffirmed and explained in *Currie v. Continental Casualty Co.*, 147 Iowa 286, 126 N. W. 165, holding that a waiver is the intentional relinquishment of a known right, and any conduct relied upon which warrants the belief that such relinquishment has been made constitutes in law a waiver.

Cross Reference. See other Rules hereof. See further on this question, annotations under Rules 3-5 of *Viele v. Germania Ins. Co.* (26 Iowa 9), ante. p. 298.

2. Insurance Companies—Waiver by Company of Conditions in Policy for Forfeiture—Acceptance of Premiums Constitutes.—The acceptance of premiums and the giving of a receipt therefor by an agent of insurer who has authority to collect premiums and receipt therefor, with knowledge of a breach by insured of a condition of a policy working a forfeiture thereof, estops the company from thereafter claiming or relying on the forfeiture, pp. 142, 143.

Reaffirmed in Trotter v. Grand Lodge of the Legion of Honor, 132 Iowa 523, 7 L. R. A. (New Series) 569, 11 Am. & Eng. Ann. Cas. 533, 109 N. W. 1102.

Reaffirmed and explained in Kimbro v. New York Life Ins. Co., 134 Iowa 96, 12 L. R. A. (New Series) 421, 108 N. W. 1030, holding that the taking of notes for premium, is an acceptance of premiums the same as if they were paid in cash.

Distinguished and narrowed in Critchett v. Am. Ins. Co., 53 Iowa 406-409 (cited in dissenting opinion 414), 36 Am. Rep. 230, 5 N. W. 547, 551, holding that a local agent of a fire insurance company who has only authority to receive applications for insurance and collect and transmit premiums, but who has no power to issue policies, cannot bind the company by an agreement extending the time of payment of an installment of the premium past the time it is due according to the policy; and that the company is not liable in such case for a loss occurring after the time such installment is overdue and not paid according to the terms of the policy.

Cross References. See other Rules hereof. See further on this question annotations under Rules 3-5 of *Viele v. Germania Ins. Co.* (26 Iowa 9), ante. p. 298.

3. Mutual Insurance Company—Policy Holder Becomes Member—To What Extent He Is Charged with Notice of By-Laws and Rules, Etc.—One who buys a policy of insurance in a mutual insurance Co., becomes a member thereof, and is charged with notice or knowledge of its articles of incorporation and by-laws; but this rule does not charge a policy holder with notice of the rules and regulations of the company in reference to the transaction of its business by its officers or agents, but only as to the provisions of its charter or by-laws fixing the rights and liabilities of the members of the company, pp. 144, 145.

Reaffirmed in Hirschl v. Clark, 81 Iowa 206, 207, 9 L. R. A. 841, 47 N. W. 80; *Corey v. Sherman, Assignee*, 96 Iowa 133, 32 L. R. A. 490, 64 N. W. 835.

Reaffirmed, explained and extended in Moore v. Fraternal Accident Ass'n, 103 Iowa 428, 72 N. W. 646, holding that the holder of a policy of insurance in a mutual company is charged with notice of and governed by a printed stipulation on the back thereof as to the condition under which it is issued and accepted.

Reaffirmed, explained and qualified in Hobbs v. Mut. Benefit Ass'n, 82 Iowa 112, 31 Am. St. Rep. 466, 11 L. R. A. 299, 47 N. W. 984; *Fitzgerald v. Metropolitan Acc. Ass'n*, 106 Iowa 459, 76 N. W. 810; *Farmers' Mut. Hail Ass'n v. Slattery*, 115 Iowa 413, 414, 88 N. W. 950, holding that a member of a mutual insurance company, whether fire, life or other kind of insurance, is presumed to have knowledge of and be governed by its articles of incorporation and by-laws in force *at the time of the issuance of the policy or of his be-*

coming a member, but is not charged with knowledge of or to be governed by by-laws thereafter passed, unless it is expressly so provided by the policy or contract of membership.

FRENCH v. GIFFORD, 30 IOWA 148

(Later Appeal 31 Iowa 428.)

1. Corporations—Equity Jurisdiction in Actions Involving—Injunction—Appointment of Receiver.—Courts of equity, aside from statutory provisions, do not exercise a jurisdiction over a corporation, as over a partnership, to dissolve it and distribute its assets; but it will afford a stockholder relief from the malfeasance of those intrusted with the management of the corporate business, by injunction or by the appointment of a receiver, p. 160.

Reaffirmed in Wallace v. Pierce-Wallace Pub. Co., 101 Iowa 322, 323, 63 Am. St. Rep. 389, 38 L. R. A. 122, 70 N. W. 217.

Reaffirmed in Cornell College v. Iowa County, 32 Iowa 522, the facts, however, not coming within the rule.

Reaffirmed in Platner v. Kirby, Le Grand Quarry Co., et al, 138 Iowa 266, 267, 115 N. W. 1034, holding that while a court of equity may control the action of the officers of a corporation so as to prevent the interests of a minority of the stockholders from being prejudiced by unlawful action, the minority has not the right to a decree of dissolution on the ground of differences of opinion as to the management or failure of the officers to conduct the business successfully and to the satisfaction of the minority; but where the corporation has become practically insolvent, so that there is danger of the seizure of its business by the creditors, a receiver may be appointed.

Reaffirmed and explained in Dickinson v. Cass County Bank, 95 Iowa 393-395, 397, 64 N. W. 395, holding that courts of equity have jurisdiction to appoint receivers of corporations, partnerships, and individuals upon the petition of any person showing himself entitled to such relief: Hence holding that where a state bank is practically insolvent, and its business is being mismanaged by its officers, equity will appoint a receiver upon complaint of a stockholder therein.

Unreported Citation 136 N. W. 673.

2. Actions—Practice—Receiver—Appointment of in Vacation, or without Notice.—Wherever in an equitable action a case is properly made, and the circumstances require or justify the appointment of a receiver, Sec. 3419 of the Code of 1860, authorizes the judge to so appoint in vacation.

Before a receiver will be appointed without notice to the defendant, the particular facts and circumstances which render such a summary proceeding proper should be set forth in the bill or petition on which such application is founded, pp. 160, 161.

Reaffirmed as to second paragraph in Bisson v. Curry, 35 Iowa 80; Maish v. Bird, 59 Iowa 311, 13 N. W. 300.

Cited in Howe & Co. v. Jones, 57 Iowa 142, 8 N. W. 457, a case wherein the order of the lower court appointing a receiver in vacation, upon motion of one party without notice to the adverse party was—under Sec. 2903 of the Code of 1873—held erroneous and reversed.

STATE v. CLARK, 30 IOWA 168

1. **District Court—Special Term—Indictment Returned at, Good—When.**—Under Sec. 2670 of the Code of 1860, the District Court may adjourn the regular term of court in one county, and go to another county and hold a special term of court, and an indictment returned thereat is valid, pp. 170, 171.

Special Cross Reference. For cases citing and sustaining the text, and others, see annotations under Weaver v. Cooledge (15 Iowa 244), Vol. II, p. 334.

WINTERS v. HOME INSURANCE CO., 30 IOWA 172

1. **Promissory Note—Accommodation Makers—Action by Indorsee—Defenses.**—In an action by an indorsee of a promissory note who took in good faith, for value, before maturity and without notice, the fact that defendant was an accommodation maker, and that his signature was obtained by fraud, is no defense, p. 174.

Reaffirmed and extended in Bankers Iowa State Bank v. Mason Hand Lathe Co., 121 Iowa 572, 90 N. W. 613, holding that the maker, or guarantor of accommodation paper is liable to a good faith indorsee thereof for value, although the latter takes with notice of the want of consideration.

DUBUQUE WOOD & COAL ASS'N v. CITY AND COUNTY OF DUBUQUE,
30 IOWA 176

1. **Damages—Proximate Recoverable, Remote Are Not—What Are.**—Damages to be recoverable must be the proximate consequence of the act complained of; that is, it must be the consequence that follows the act, and not the secondary result from the first consequence, either alone or in combination with other circumstances, p. 184.

Reaffirmed in Georgia v. Kepford, 45 Iowa 49, 50; Vanhorn v. City of Des Moines, 63 Iowa 449, 50 Am. Rep. 750, 19 N. W. 294; Knapp v. Sioux City & Pac. Ry. Co., 65 Iowa 94, 54 Am. Rep. 1, 21 N. W. 199; Neilson v. Gilbert, 69 Iowa 693, 23 N. W. 667; De Camp v. Sioux City, 74 Iowa 395, 37 N. W. 972; West v. Ward, 77 Iowa 324, 325, 14 Am. St. Rep. 284, 42 N. W. 310; Green-Wheeler Shoe Co. v. Ch. R. I. & P. Ry. Co., 130 Iowa 127, 8 Am. & Eng. Ann. Cas.,

455, 5 L. R. A. (New Series) 882; 106 N. W. 499, all applying the rule under different states of fact.

(Note.—As this rule is dependent upon the facts of each case for its application, no syllabi are given.—Ed.)

TURNER v. FIRST NATIONAL BANK, 30 IOWA 191

1. Practice—Nunc Pro Tunc Order or Judgment in Lower Court after Appeal to Supreme Court, When Void.—A *nunc pro tunc* order or judgment entered by the lower court upon motion of plaintiff without notice to the defendant and while an appeal is pending in the Supreme Court, is void, p. 194.

Reaffirmed and explained in Guinn v. Iowa & St. L. Ry. Co., 131 Iowa 683, 109 N. W. 210, holding that when a final decree in a chancery action is appealed, the district court loses jurisdiction of the cause during its pendency, and has no power to entertain a motion, or to enter an order therein, until it, or some part of it, is remanded.

Cross reference. See further on this question, annotations under Levi v. Karrick (15 Iowa 444), Vol. II, p. 361.

GRAY v. ILIFF, 30 IOWA 195

1. Actions Commenced before Taking Effect of the Code of 1860—What Code Governs Proceedings in—Sec. 4172 of the Code of 1860, Construed.—Where an action was commenced before the taking effect of the Code of 1860, the provisions of that Code govern the time and manner of issuing execution on a judgment therein rendered. Sec. 4172 of the Code of 1860, does not apply to such a case, pp. 196, 197.

Cited in Woods v. Haviland, 59 Iowa 477, 478, 13 N. W. 637, the Court holding that Sec. 3569 of the Code of 1873 extending the time for issuing execution on judgments in justice's courts applies to and extends such time as to a judgment rendered before the Code of 1873 took effect, when the judgment or execution was not barred at the time of the taking effect of such Code—Secs. 47, 50 of the Code of 1873 excepting such a case from the general repeal of former codes and statutes.

Cited in Jones v. German Ins. Co., 110 Iowa 80, 46 L. R. A. 860, 81 N. W. 190, the Court holding that Sec. 1744 of the Code of 1897, providing that insured shall not commence action on a policy within forty days after notice and proofs of loss have been given to the insurance company, is constitutional, and applies to all causes of action under policies on which action is not commenced at the time of the taking effect of such section.

COOKE v. ILLINOIS CENTRAL R. R. Co., 30 IOWA 202

1. Railroad Companies—Liability for Negligence of Agent or Employee—Torts of Employee.—A railroad company is liable for the negligent acts of its agents or employees in the course of their employment, but not for their willful or criminal acts, p. 203.

Reaffirmed in Porter v. C. R. I. & P. R. R. Co., 41 Iowa 361, 362.

Cited in Foley v. C. R. I. & P. Ry. Co., 64 Iowa 648, 21 N. W. 126, the court holding that under Sec. 7, Chap. 169, Acts of 1862, an action is maintainable against a railroad company for injury to, or the death of an employee occasioned by the negligence, or mismanagement of a fellow servant, an engineer or other agent or employee in the operation of its railroad, or of its trains; and this rule applies to all persons employed by a railroad company whose employment is connected with the operation of trains, and which exposes them to the hazards and perils thereon attendant, but not to persons otherwise employed by such company, the Common Law doctrine of fellow servant applying to this latter class.

Cited in Benton v. C. R. I. & P. R. R. Co., 55 Iowa 498, 8 N. W. 331, not in point.

Distinguished in McKinley v. C. & N. W. R. R. Co., 44 Iowa 317, 24 Am. Rep. 748, holding that a railroad company is liable for an assault and battery of a brakeman on a passenger train, committed by the brakeman under the belief that he was executing the orders of the company in preventing the passenger from re-entering the car.

Overruled in Marion v. Ch. R. I. & P. Ry. Co., 64 Iowa 571, 572, 21 N. W. 87, holding that (under Sec. 1307 of the Code of 1873), a railroad company is liable for the willful wrong of any employee in the course of his employment, and in any manner connected with the operation of its railroad, irrespective of the motive, of such employee, actuating its commission.

STATE v. MULLEN, 30 IOWA 203

1. Larceny—Property in Hands of Bailee or Trustee—Allegations of Ownership in Indictment.—In an indictment for larceny whenever the property is stolen from a bailee, trustee or other person having a special interest therein, the ownership of the property may be averred as either in such bailee, etc., or in the legal owner, p. 205.

Cited in State v. Wasson, 126 Iowa 322, 101 N. W. 1126, the court holding that an allegation of ownership is necessary in an indictment for robbery.

Cross Reference. See further in this connection annotations under State v. Morissey (22 Iowa 158), ante. p. 15.

WILLMERING *v.* MCGAUGHEY, 30 IOWA 205, 6 AM. REP. 673

1. Written Contracts—Construction of—Extrinsic and Parol Evidence to Explain Meaning of Words in—Parol Evidence of Usage or Custom Controlling Language in.—When a new and unusual word is used in a written contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it: But when no new word is used, or when an old word, having an established place in the language, is not *apparently* used in any new, technical, or peculiar sense, it is the province of the court to put a construction on the written contract of the parties, according to the established usage of language, as applied to the subject-matter.

Words in a written contract which do not of themselves denote that they are used in a technical sense are to have their plain, popular, obvious and natural meaning, p. 209.

Reaffirmed in Cash *v.* Hinkle, 36 Iowa 625, 626; Ryan *v.* City of Dubuque, 112 Iowa 287, 83 N. W. 1074; Winnebago State Bank *v.* Hustel, 119 Iowa 117, 93 N. W. 70.

Reaffirmed and explained in Tubbs *v.* Mechanics' Ins. Co., 131 Iowa 220, 221, 108 N. W. 326, holding that in the absence of any apparent defect or ambiguity of expression, and absence of technical terms of science, art, or trade, no extrinsic evidence is admissible to aid in the interpretation of a written contract or other instrument.

Reaffirmed and explained in Steele *v.* Andrews & Sons, 144 Iowa 364, 365, 121 N. W. 19; Healy *v.* Tyler, 150 Iowa 172, 129 N. W. 803, holding that customs are never paramount to the contract as expressed by the parties; but that on the contrary they are subordinate to the contract, and can never be permitted to contradict it, nor to affect the rights of the parties as fixed by the plain terms of the contract.

(Note.—There are many cases sustaining, but not citing the text.—

N. B.—Neither fraud, accident or mistake was involved in this present case or those annotated under it.—Ed.)

CORNOG *v.* FULLER, 30 IOWA 212

1. Mortgage—Transfer of Notes Secured by—Rights of Assignee—Rights of Innocent Third Persons.—The transfer of a note secured by mortgage carries with it the mortgage lien, and is effective as against the parties thereto and the mortgagor, but not against an innocent third person who acts in relation to the mortgaged property without either actual or constructive notice thereof. Such an assignee must record his assignment in order for it to impart constructive notice to such third persons, pp. 213-215.

Reaffirmed in Livermore v. Maxwell, 87 Iowa 714, 55 N. W. 40; Day v. Brenton, 102 Iowa 489, 63 Am. St. Rep. 460, 71 N. W. 540.

Reaffirmed and explained in Bowling v. Cook, 39 Iowa 202, holding that a mortgage on land executed by a mortgagee in a prior mortgage, is superior to the right of the assignee of the first mortgage debt, where the assignment of the first is not of record and the second mortgagee had no actual notice thereof at the time he took his mortgage.

Reaffirmed and qualified in Brayley v. Ellis, 71 Iowa 156, 32 N. W. 255, holding that one who purchases real estate with a mortgage thereon which is not released of record, takes it subject thereto.

Cited in Kenosha Stove Co. v. Shedd, 82 Iowa 545, 48 N. W. 934, the court holding that an assignment of a mortgage is required by law to be recorded; and that a certified copy of such a recorded assignment is admissible in evidence without preliminary proof.

Cited in Rand, Ex'r, v. Barrett, 66 Iowa 738, 24 N. W. 533, not in point.

Cross Reference. See further on this question, annotations under Bank of Indiana v. Anderson (14 Iowa 544), Vol. II, p. 284.

HALL v. ÆTNA MFG. CO., 30 IOWA 215

1. Action on Written Instrument—Burden of Proof—When Plaintiff Required to Prove Genuineness of Signature to Instrument.—In an action on a written instrument or an action founded on a writing, the plaintiff is not required, under Sec. 2967, as amended by Chap. 28, Acts of 1862 (9th General Assembly) to prove the genuineness of the signature thereto, unless the defendant specifically denies this fact in his answer and under oath before the trial is commenced; and an inferential denial, of knowledge or information sufficient to form a belief, etc., is not sufficient for this purpose, pp. 218, 219.

Reaffirmed in Douglass v. Matheny, 35 Iowa 113, 114.

Reaffirmed and qualified in Sully v. Goldsmith, 49 Iowa 691, holding that where the defendant who is sued on a promissory note, denies the execution thereof, but does not deny the genuineness of the signature under oath, this, while not casting upon the plaintiff the burden of proof as in the text, allows the defendant to prove that the signature thereto was not genuine; that he did not sign it.

2. Principal and Agent—Evidence of Agency—Testimony of Person Acting as Agent—Facts and Circumstances.—In an action against a principal, the testimony of the person who acted as agent, that he acted as the agent of the principal, implies that he acted as his (defendant's) *authorized agent*.

In such a case although the jury may not find the fact of agency from the acts of the reputed agent *alone*, yet these are proper to be considered by them in connection with the reputed agent's testimony,

and the other facts and circumstances proven, in arriving at their verdict on such question, pp. 219, 220.

Distinguished in Schlitz Brewing Co. v. Barlow, 107 Iowa 254, 77 N. W. 1032, holding that while an agent may be a witness to prove his agency, his declarations are not competent for such purpose, if knowledge thereof is not brought home to the principal and his acquiescence shown.

3. Contract of Purchase of Machine—Warranty of Seller—Duty of Purchaser upon Breach.—Where the seller of a mowing and reaping machine warrants that "if it will not work in a particular manner and do a certain work, he will take it back," and the buyer upon finding that it does not do good work offers to return the machine and demands his purchase price notes, he (the buyer), has fully complied with his contract, is not liable on the notes, and may sue therefor, pp. 220, 221.

Reaffirmed and explained in Padden v. Marsh, 34 Iowa 523, 524, holding that where defendant executed a written warranty of a harvester machine, by the terms whereof if the machine did not comply therewith, the plaintiff was to deliver it to defendant at a certain place, and upon its failing to so comply the plaintiff offered to so deliver, and defendant told him that he would not receive it, that such delivery was waived, and plaintiff could recover for the breach of warranty without so doing.

FISHER v. SCHOLTE, 30 IOWA 221

1. Pleading—Demurrer to Petition—Answer Filed with Demurrer, When Waives Demurrer and Ruling Thereon.—Although, under Sec. 2879 of the Code of 1860, defendant may file a demurrer to one of several causes of action set out in the petition, and an answer to the rest at one time, yet if he files a demurrer and answer to the same cause of action in the petition at the same time, the answer waives the demurrer and any error in the ruling thereon, p. 222.

Reaffirmed and varied in Philips v. Hosford, 35 Iowa 594 (abstract); Westphal, Hinds & Co. v. Henney, 49 Iowa 543, holding that objections to the ruling upon a demurrer is waived by pleading over in conformity to the judgment of the court upon the question presented by the demurrer: That the rule is applicable to a case where the demurrer is sustained as well as when it is overruled.

(Note.—There are many cases sustaining the annotations under this text, but not citing the text.—Ed.)

PHELPS v. KATHRON, 30 IOWA 231

1. Actions—Plea of Tender—Effect—Verdict Inconsistent with—New Trial.—The defendant's plea of tender admits the plain-

tiff's cause of action to the extent of the amount tendered; and in such case where a verdict is for less than the amount tendered by the defendant, and the court refuses to grant plaintiff a new trial, the judgment thereon will be reversed upon appeal, pp. 231, 232.

Reaffirmed in Gray v. Graham, 34 Iowa 426; Babcock v. Harris, 37 Iowa 410; Rainwater v. Hummell, 79 Iowa 572, 44 N. W. 815.

Reaffirmed and explained in Shugart v. Pattee, 37 Iowa 424, 425, holding that a plea of tender is an admission that the amount tendered is due to the plaintiff; but it is insufficient unless the money is paid into court and a continued *readiness*—not simply a willingness—to pay is averred.

Reaffirmed and extended in Wilson v. Ch. M. & St. P. Ry. Co., 68 Iowa 674, 27 N. W. 916, holding further that where defendant pleads and tenders an amount due the plaintiff, he cannot thereafter move in arrest of judgment of a verdict in the action, as the latter motion denies plaintiff's right to recover any amount, and is inconsistent with the plea of tender.

Reaffirmed and qualified in Sheriff v. Hull, 37 Iowa 178, holding that where the verdict against defendant is for less than the amount tendered and kept good by him, and the court thereupon enters judgment thereon and orders (as is allowed by Sec. 3138 of the Code of 1860) that the amount tendered and paid into court be paid to plaintiff, that such latter order cures the defect in the verdict and judgment.

Reaffirmed and qualified in Griffin & Adams v. Harriman, 74 Iowa 438, 38 N. W. 140, holding that a plea of tender admits that the amount tendered is due to the plaintiff upon a cause of action set out in the petition; but it does not necessarily, admit all of plaintiff's alleged grounds for recovery; and these must be determined by the pleadings.

Reaffirmed and qualified in Ahrens v. Fenton, 138 Iowa 563, 115 N. W. 235, holding that a tender by defendant of the sum sued on by the plaintiff, does not preclude him from pleading a counterclaim in such action, arising upon a wholly independent transaction.

Cross References. See further on this question annotations under rule 2 of Brayton v. Delaware County (16 Iowa 44), Vol. II, p. 401; Mohn v. Stoner (11 Iowa 30), Vol. I, p. 765.

HASKEL v. CITY OF BURLINGTON, 30 IOWA 232

1. Statutes—When Given Retrospective or Retroactive Effect—Municipal Corporations—Taxation and Revenue—Act of 1868 Allowing Cities to Sell Property for Delinquent Taxes—To What Taxes It Applies.—Unless a statute clearly shows on its face an intention on the part of the Legislature that it have a retrospective or retroactive operation, it will not be so construed.

So the Act of 1868, Chap. III (12th General Assembly) authorizing cities to sell real and personal property for delinquent taxes,

operates upon delinquents at the time of its passage, as well as to those delinquent thereafter, pp. 233-235.

Reaffirmed and explained as to first paragraph in Sully v. Kuehl, 30 Iowa 278, holding that Sec. 762 of the Code of 1860, providing that an error or irregularity in a tax sale shall not affect its validity, applies to a sale for a delinquency existing at the time of its passage.

Reaffirmed as to first paragraph in Fidelity Loan & Trust Co. v. Douglas, 104 Iowa, 539, 73 N. W. 1041, holding that remedial statutes will receive a liberal construction; and the court will look to both the mischief and remedy in so construing.

Reaffirmed and qualified as to first paragraph in Galusha, treasurer, v. Wendt, Ex'x, 114 Iowa 602, 603, 87 N. W. 514, holding that a curative or remedial statute is unconstitutional so far as it affects vested rights arising out of obligations under contracts made before its taking effect.

Cited as to first paragraph in State v. Gurlagh, 76 Iowa 144, 40 N. W. 142 (dissenting opinion), the majority court opinion not in point.

Cited as to first paragraph in Rauens, Adm'r, v. Prudential Ins. Co., 129 Iowa 732, 106 N. W. 201, the court holding that it is the duty of the court, whenever it can be consistently done, to so construe a statute as to give it force and effect, and in such manner as to best accomplish the evident intent of the Legislature.

Cited in Tuttle v. Polk & Hubbell, 84 Iowa 17, 50 N. W. 39, not in point, but involving the power of the Legislature to pass curative statutes.

Cited in Weiser v. McDowell, 93 Iowa 779 (dissenting opinion), 61 N. W. 1096, the majority court opinion not in point.

Unreported citation, 99 N. W. 559.

2. Constitutional Law—Local and Special Legislation—Revenue Statutes Relating to All Cities of a Class, Not.—The General Assembly may divide cities and towns into classes, and make general laws concerning each class; or it may pass laws applying to all cities of a particular kind or class; and such laws are not local or special legislation or unconstitutional.

So Chap. III Acts of 1868 (12th General Assembly) authorizing certain cities and towns to sell property for taxes without recourse to the courts, etc., is constitutional, pp. 231-238.

Reaffirmed as to first paragraph in Ulbrecht v. City of Keokuk, 124 Iowa 4, 97 N. W. 1083.

Reaffirmed, explained and narrowed in State v. City of Des Moines, 96 Iowa 526-529, 59 Am. St. Rep. 381, 31 L. R. A. 186, 65 N. W. 820, holding that if the law is made to operate upon a particular condition as to persons or property, and is operative whenever and wherever the same conditions exist, affixing the same consequences, then it is a general law in its operation, even though it only

operates on one of the conditions or classes specified: That general legislation looks not alone to the present, but to the future; and a law which at a given time operates as to only one corporation, company or society of a particular kind, because there is then no other, but is so framed as to operate on the same conditions, when and where they arise in the state, is a general law, and of uniform operation: But as applied to cities, if the Act is such that it is operative, because of its terms, as to only a single city, it is local legislation: Hence, holding that the legislature cannot pass a special law annexing territory to a city; and that where the law for such purpose, is made applicable to cities of a certain population, there being only one such city in the state, it is a special law and unconstitutional—But see *Eckerson v. City of Des Moines*, 137 Iowa 469-471, 115 N. W. 184 (reaffirming the text and partially overruling this last case) holding that an act concerning municipal corporations is not local or special if it brings all municipalities similarly conditioned, then existing and thereafter to come into existence, into a class, and in respect of each of which the law is to have uniform operation; nor is such an act subject to such an objection which confers upon a class of municipalities theretofore existing, or brought into existence by the act itself, powers to be exclusively enjoyed: Hence, upholding the constitutionality of Chap. 48 Acts of Thirty-second General Assembly (Acts of 1907), entitled "An act to provide for the government of certain cities, and the adoption thereof by special election. Additional to Title 5 of the Code of 1897," and granting certain powers to "any city of the first class, or with special charter, now or hereafter having a population of twenty-five thousand or over."

Reaffirmed and extended as to first paragraph in Iowa R. R. Land Co. v. Soper, 39 Iowa 115, 116; *Tuttle v. Polk & Hubbell*, 92 Iowa 443, 60 N. W. 737; *Morris v. Stout*, sheriff, 110 Iowa 660, 50 Am. Rep. 97, 78 N. W. 844, holding that a statute meets the constitutional requirement as to being of a general nature and uniform operation, if it applies to all persons coming within the relations, circumstances and situation dealt with by it; and its validity or constitutionality is not affected by the fact that it grants powers, privileges or immunities to or imposes duties and liabilities upon, or otherwise regulates a particular class of persons, real or legal, when it applies to all of the class.

Reaffirmed and extended as to second paragraph in *Augustine v. Jennings*, 42 Iowa 201-203, holding further that under Chap. 111, Acts of 1868 (12th General Assembly) a city to whom it applies may, by ordinance, prescribe the manner of redemption from tax sales had thereunder, in which power is included that of so prescribing the interest and penalties to be paid upon such redemption.

Cited in *Tackaberry & Co., v. City of Keokuk*, 32 Iowa 158, the court holding that when a city charter refers to the general state reve-

nue law for the subject of taxation, any change in the latter correspondingly changes the former.

Cited in City of Burlington v. Leebrick, 43 Iowa 257, the court upholding constitutionality of Sec. 431 of the Code of 1873, in relation to the annexation of territory to a city; and holding that under Sec. 551 of that Code, such section applies to cities previously organized and existing under special charter.

Cited in State v. Higgins, 121 Iowa 23, 95 N. W. 246, not in point.

Cross Reference. See further on this question, annotations under Rule 5 of McAunich v. M. M. R. R. Co. (20 Iowa 338), Vol. II, 823; Ex parte Pritz (9 Iowa 30), Vol. II, p. 540.

FLEMING v. MADDOX, 30 IOWA 239

1. Judicial and Execution Sale of Land—Notice to Defendant in Possession of Levy and Sale—Failure to Give—Setting Aside Sale.—A judgment defendant whose land is ordered sold, either under general or special execution and who is in actual occupation thereof, is (under Sec. 3318 of the Code of 1860) entitled to written notice of the sale, at least twenty days previous thereto; and a failure to give such notice is ground for the sale being set aside upon motion at the same or next term of court at or after it is made, p. 243.

Distinguished and narrowed in Bennett & Frantz v. Burton, 44 Iowa 552, holding that when the defendant in execution is not himself in the actual possession and occupation of the land levied on, no notice is required to be given under Sec. 3087 of the Code of 1873, corresponding to section of the text; and that occupation by a tenant or other person holding under the defendant is not sufficient to require such notice to be given.

SMITH v. CEDAR FALLS & MINNESOTA R. R. CO., 30 IOWA 244

1. Pleading—Demurrer—Amendment of Pleading after Demurrer Sustained, Waives Error.—Error, if any, by the court in sustaining a demurrer to a pleading is waived by the party amending his pleading after it is sustained, p. 247.

Reaffirmed in Philips v. Hosford, 35 Iowa 594, (abstract); Scholl v. Bradstreet Co., 85 Iowa 553, 52 N. W. 501.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

2. Principal and Agent—Agency Coupled with an Interest—When Agency Irrevocable Because of.—Where an agent is given an interest in the property which is the subject of the contract of agency, upon his performing certain services in relation thereto, the agency is irrevocable by the principal upon the agent performing the services.

So where an agent is empowered to obtain donations and subscriptions to aid in extending a railroad to a certain point, and is to receive for his services a certain portion of the donations and subscriptions procured by him, the agency is revocable until the agent performs services or procures some donations or subscriptions thereunder, pp. 248, 249.

Reaffirmed and explained in Bird v. Phillips, 115 Iowa 708, 87 N. W. 415, holding that when an agent has earned a right to some compensation under a contract to procure an exchange of lands, the agency is one coupled with an interest, and is not revocable at the pleasure of the principal.

STATE v. WOOLSEY, 30 IOWA 251

1. New Trial in Criminal Cases—Verdict against Weight of Evidence—Discretion of Trial Court—Review of Ruling on Appeal.—The Supreme Court will more liberally review the trial court's ruling in refusing to grant defendant a new trial in a criminal case than in civil actions; and where in such a case it appears on appeal, that the verdict was clearly against the weight of evidence and resulted in injustice, the judgment will be reversed, p. 254.

Reaffirmed in State v. Wise, 83 Iowa 599, 50 N. W. 60.

Cross References. See further on this question annotations under Rule 2 of State v. Johnson (19 Iowa 230), Vol. II, p. 719; Rule 2 of State v. Tomlinson, (11 Iowa 401), Vol. I, p. 833.

MCGREGOR, AND SIOUX CITY R. R. CO. v. BIRDSALL, 30 IOWA 255

1. Pleading—Demurrer—Demurrer in General Terms Not Stating Objections in Action at Law, Insufficient.—Under the Code of 1860, a demurrer to a pleading in an action at law must specifically point out the objection or objections thereto, but need not give reasons therefor, p. 257.

Reaffirmed in Robinson, County Treasurer, v. Grant & Son, 119 Iowa 574, 575, 93 N. W. 587, under the Code of 1897.

Cross Reference. See further on this question, annotations under Rule 1 of Dav. Gas. L. & Coke Co. v. City of Davenport (15 Iowa 6), Vol. II, p. 295.

(Note.—There are numerous cases sustaining but not citing the text.—Ed.)

2. Constitutional Law—Railroads—Power of Legislature to Pass Law Authorizing Municipal Corporations to Aid in Construction of—Chap. 48 Acts of 1868 Concerning, Constitutional.—The Legislature may authorize counties, townships, cities, towns or other municipal corporations to vote a tax to aid in the construction of a railroad: And Chap. 48, Acts of 1868 (12th General Assembly) for this purpose, is constitutional, p. 257.

Reaffirmed in Bonnifield v. Bidwell, 32 Iowa 151.

Cross Reference. See further on this question, annotations under *Stewart v. Board of Supervisors of Polk County* (30 Iowa 9), ante, p. 564.

STATE *v.* CROW, 30 IOWA 258

1. Highways—Prescription—What Sufficient and What Not—

If a road is used and worked by the public as a highway for the statutory period (Code of 1860) of ten years, with the knowledge and consent of the owner of the land, it is a highway by prescription, unless there is proof introduced showing that it was so used by leave, favor or mistake of the land owner, p. 259.

Reaffirmed in *State v. Gould*, 40 Iowa 374; *Kelsey v. Furman*, 36 Iowa 615, 616; *Baldwin v. Herbst*, 54 Iowa 169, 6 N. W. 257.

Reaffirmed and explained in *State v. Welpton*, 34 Iowa 147; *State v. Schilb*, 47 Iowa 613, 614, holding that a dedication of land to the use of the public rests upon the intention and clear assent of the owner of the soil; that when acts are relied upon to establish it, they must be inconsistent and irreconcilable with any inference except that of the *animus dedicandi*; that they must be unambiguous and unequivocal: And that where a public road is established by legal proceedings, a prescriptive use will not be made out because the road as used slightly varies from the line establishing it as set out in the order of court.

Reaffirmed and narrowed in *State v. Waterman*, 79 Iowa 367, 44 N. W. 679, holding that where the public uses a road under claim of right for the statutory period of ten years and with the knowledge of, and without objection by the land owner, it establishes a highway by prescription, although the use by the public is under a void legal proceeding establishing the highway.

Distinguished and narrowed in *Buch v. Flanders*, 119 Iowa 167, 168, 93 N. W. 102, holding that in the absence of other controlling circumstances, the inference is conclusive that the division line between adjoining tracts, definitely marked by the erection and maintenance of a fence or other monuments, recognized by the owners as such, and up to which they have occupied and cultivated the land on either side more than ten years—the statutory period of limitations—is the true boundary between them; and that where parties have agreed, either expressly or by long acquiescence, that the lines of a highway, as actually laid out, or as determined upon and marked out by them, shall constitute the boundary lines between their respective holdings, the case stands as though a hedge, fence or other monument should be agreed upon as marking the true line.

Distinguished and narrowed in *Quinn v. Baage and Heiber*, 138 Iowa 436-438, 114 N. W. 209, holding that where there has been no practical location of boundaries of a highway as surveyed, the public is not estopped or bound by acquiescence in the maintenance of a fence

by the abutting land owner within the limits of a strip established as a highway, however long continued.

(Note.—This Quinn case partially overrules *Axmear v. Richards*, 112 Iowa 657, 84 N. W. 686.—Ed.)

Cross Reference. See further on this question annotations under *Onstott v. Murray* (22 Iowa 457), ante. p. 56.

RUSSELL v. CITY OF BURLINGTON, 30 IOWA 262

1. Evidence—Value of and Damages to Property—Opinions of Witnesses—Admissibility.—Opinions of witnesses as to the *value* of property which is the subject of litigation are admissible, but not their opinions as to the *amount of damages* sustained, p. 266.

Reaffirmed in *Harrison v. Iowa Midland R. R. Co.*, 36 Iowa 325; *Hartley v. K. & N. W. Ry. Co.*, 85 Iowa 466, 467, 52 N. W. 355, 356, proceedings to condemn land for railroad right of way.

Reaffirmed and qualified in *Richardson v. Webster City*, 111 Iowa 430, 431, 82 N. W. 921, holding that in a condemnation proceeding any form of question to a witness the answer to which will call for an expression of opinion as to the *damages* to the land owner, will make the answer thereto reversible error.

Cross Reference. See further on this question, annotations under Rule 2 of *Prosser v. Wapello County* (18 Iowa 327), Vol. II, p. 639.

2. Municipal Corporations—Right of City to Grade Streets—When Abutting Lot Owner May Sue for Damages to—Negligence or Unskillfulness.—A city has authority to grade its streets, and is not liable to any abutting lot owner for damages resulting therefrom, unless such compensation is given by statute, or the property is injured by the negligence or unskillfulness of the city in doing the work, p. 267.

Reaffirmed in *Talcott Bros. v. City of Des Moines*, 134 Iowa 117, 118, 129, 120 Am. St. Rep. 419, 12 L. R. A. (New Series) 696, 109 N. W. 312.

Reaffirmed and explained in *Hoffman v. City of Muscatine*, 113 Iowa 335, 85 N. W. 18, holding that a city will not be permitted to divert a large quantity of surface water from its natural course in another direction, so as to flow on a lot owner's land in destructive quantities, through a drain or channel.

Reaffirmed and explained in *Hume v. City of Des Moines*, 146 Iowa 645-649, 1912 B., Am. & Eng. Ann. Cas., 904, 120 N. W. 1047, holding that a city has a right to grade and gutter its streets and is not liable for accepting defective plans therefor; but it is liable if it negligently carries out such plans, or if without the adoption of any plans it proceeds in a negligent manner to make embankments or fills to the injury of an abutting or adjoining proprietor.

Reaffirmed and varied in City of McGregor v. Boyle, 34 Iowa 271, holding that the rule applies in case of the construction of a sewer by a city in its streets.

Distinguished in Freburg v. City of Davenport, 63 Iowa 122, 123, 50 Am. Rep. 737, 18 N. W. 707, holding that a city has the right to grade its streets; and it is not liable in damages for failure to provide culverts, or gutters adequate to keep surface water from adjoining lots which are below the established grade of a street—"particularly," says the court, "if the injury would not have occurred had the lots been filled up, so as to have been on a level with the street."

Distinguished in Farmer v. City of Cedar Rapids, 116 Iowa 324, 325, 89 N. W. 1105, holding that in an action by an abutting lot owner with improvements thereon, to recover damages from a city—under Sec. 785 of the Code of 1897—by reason of the changing or altering an established grade, the plaintiff may recover both for injury to the lot *and* improvements, provided he improved according to the *established* and not the *physical* grade of the street.

Unreported citation, 125 N. W. 854, 855.

Cross References. See further on this question, annotations under Ellis v. Iowa City (29 Iowa 229), ante. p. 519; Dalzell v. City of Davenport (12 Iowa 437), Vol. II, p. 70; Rules 1 & 2 of Cotes & Patchin v. City of Davenport (9 Iowa 227), Vol. I, p. 568.

WHITE v. RITTENMEYER, 30 IOWA 268

1. Mortgage—Nature and Effect of—Who Owner of Land Mortgaged—Rights of Mortgagee.—The legal title to mortgaged land remains in the mortgagor until divested by foreclosure proceedings. The mortgagee before foreclosure has only a chattel interest, a lien upon the land to secure his debt, pp. 272, 273.

Reaffirmed in Boggs v. Douglass, 105 Iowa 346, 347, 75 N. W. 186; Busch v. Hall, 119 Iowa 282, 93 N. W. 357.

Reaffirmed and varied in Hubbard & Spencer v. Hartford Ins. Co., 33 Iowa 333, 11 Am. Rep. 125, holding that the fact that a stock of goods is covered by a chattel mortgage at the time of the issuance of a policy of fire insurance thereon to the mortgagor (owner), does not forfeit the policy under a clause therein providing therefor if the insured is not the "sole and unconditional owner."

Cited in Devin v. Hendershott, 32 Iowa 194-196, holding that the grantee in a deed of trust takes the legal title and is entitled to covenants running with the land—the court saying that the same rule as to covenants would apply to a mortgagee.

Cited in Oskaloosa Water Co. v. Board of Equalization of Oskaloosa, 84 Iowa 412, 15 L. R. A. 296, 51 N. W. 19, the case turning on other points.

Distinguished in Severin v. Cole, and B. C. R. & M. Ry. Co., 38 Iowa 464, holding that a mortgagee of land is an "owner" within the

meaning of the Code (1873) in relation to *ad quod damnum* proceedings for a railroad right of way, and as such owner is entitled to notice of the proceedings.

Cross Reference. See further on this question, annotations under Rule 2 of *Newman v. De Lorimer* (19 Iowa 244), Vol. II, p. 722.

SULLY *v.* KUEHL, 30 IOWA 275

(Former appeal 27 Iowa 160.)

1. Tax Sale of Land—Part of Taxes Legal and Part Illegal—Validity of Tax Sale and Deed.—Where land is sold for taxes, part of which is legal and part illegal, the sale and deed made thereunder are—under Sec. 762 of the Code of 1860—valid, p. 276.

Reaffirmed in *Corning Town Co. v. Davis*, 44 Iowa 633.

Cross Reference. See further on this question, annotations under Rule 4 of *Eldredge v. Kuehl* (27 Iowa 160), ante. p. 381.

2. Tax Sale of Land—On What Days May be Made—Recitals in Tax Deed Concerning—Sufficiency of—Presumption of Regularity of Sale.—A tax deed which recites that the land was sold for the taxes on the first Monday in December is not void by reason of the sale not being made at a time authorized by law, unless it is shown that the sale was made contrary to the provisions of Sec. 776 of the Code of 1860. Although Sec. 763 of the Code of 1860 provides that all sales of land for taxes shall be made on the first Monday in October, yet Sec. 776 thereof provides that under certain conditions such sales may be made on the first Monday of the next succeeding month in which they can be made; and when a tax deed shows on its face that it was made on the first Monday of a succeeding month, it will be presumed, unless the contrary be shown, that the sale was as provided and allowed by Sec. 776, above mentioned, p. 277.

Special Cross Reference. For cases citing and sustaining the text, and others, see annotations under Rule 1 of *Eldredge v. Kuehl* (27 Iowa 160), ante. p. 381.

3. Statutes—Tax Sales—Section 762 of the Code of 1860—To What Taxes Operative—Retrospective Statutes.—The Legislature may make a statute relating to the remedy, retrospective in its operation.

So Sec. 762 of the Code of 1860 providing that an error or irregularity in a tax sale shall not affect its validity, applies to a sale for a delinquency existing at the time of its passage, p. 278.

Reaffirmed and varied as to first paragraph in *Ross v. Board of Supervisors of Wright County*, 128 Iowa 432, 1 L. R. A. (New Series) 431, 104 N. W. 508, holding that the Legislature may by amendment, cure a constitutional defect in a statute the main purpose of which is within the scope of legislative power and give such amendment retroactive effect upon cases already begun and pending—the court

upholding constitutionality of Chap. 67, Laws of 1904 (30th General Assembly).

Cross Reference. See further on this question, annotations under *Haskel v. City of Burlington* (30 Iowa 232), ante. p. 589.

4. New Trial—Newly Discovered Evidence as Ground for—Diligence, etc., to be Shown.—In order to entitle a party to a new trial, upon the ground of newly-discovered evidence, the party applying therefor must show, not only his ignorance of the existence of the testimony, but that a knowledge of it could not have been obtained by the exercise of reasonable diligence: The party must show what he actually did in order that the court may judge of the sufficiency of the diligence; and the application for new trial should be accompanied by the affidavit of the newly discovered witness, where it can be procured, pp. 278, 279.

Reaffirmed in *Hesser v. Doran*, 41 Iowa 470; *Hand v. Langland*, 67 Iowa 186, 25 N. W. 122.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

FARMERS' & MECHANICS' BANK v. MATHER, 30 IOWA 283

1. Confession of Judgment—Want of Assent of Creditor—Void Judgment.—A judgment by confession entered at the instance of the debtor without the assent of the creditor, is not binding on the latter and will be set aside on his motion. Such a judgment, in order to be binding, must be entered with the assent of both debtor and creditor, pp. 284, 285.

Unreported citation, 134 N. W. 736.

STEVENSON v. BONESTEEL, 30 IOWA 286

1. Tax Sale of Land—Limitation of Actions—Action by Tax Purchaser to Quiet Title—Section 790 of the Code of 1860, Construed.—Section 790 of the Code of 1860, allowing the owner of land sold for taxes to bring an action to recover it and to set aside the sale and deed made thereunder within five years, does not preclude the tax sale purchaser suing in equity within such time to quiet his title, p. 288.

Reaffirmed and extended in *Knudson v. Litchfield*, 87 Iowa 118, 119, 54 N. W. 201, holding that Sec. 902 of the Code of 1873, corresponding to the section of the text, allows such an action by the tax sale purchaser within five years after the execution and recording of the tax deed.

Cross Reference. See further on this question, annotation under Rule 6 of *Eldredge v. Kuehl* (27 Iowa 160), ante. p. 381.

2. Judgment Merely Erroneous—Collateral Attack Not Allowed.—Where the court has jurisdiction of the subject-matter and

of the parties, a judgment, however erroneous, is not void upon collateral attack; but it must be corrected on motion or appeal, pp. 289, 290.

Cited in Johns v. Pattee, 55 Iowa 666, 8 N. W. 663, the court holding that a stranger to a judgment cannot collaterally attack it.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

Cross Reference. See further on this question, annotations under Shawhan v. Loffer (24 Iowa 217), ante. p. 170; Kitsmiller v. Kitchen (24 Iowa 163), ante. p. 158.

GOODRICH v. BROWN, 30 IOWA 291

1. **Judicial Notice—City Ordinances.**—The Supreme Court will not take judicial notice of a city ordinance, but it must be pleaded and proved by the party relying thereon, p. 294.

Reaffirmed and qualified in State v. Olinger, 109 Iowa 671, 80 N. W. 1060, holding that courts of record will not take judicial notice of an ordinance of a city, except in appeals from inferior tribunals, and such ordinance must be specially pleaded.

Distinguished in Town of Scranton v. Danenbaum, 109 Iowa 96, 80 N. W. 221, holding that the district court will take notice of a city ordinance the same as public statutes, upon a case coming on appeal to that court.

2. **Inferior Courts—Jurisdiction of to Affirmatively Appear from Record.**—In a court of inferior jurisdiction the record must show the facts conferring jurisdiction, p. 294.

Reaffirmed in State v. Minn. & St. L. Ry. Co., 88 Iowa 696, 697, 56 N. W. 403.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

LONGSHORE v. JACK & CO., 30 IOWA 298

1. **Contracts—Fraud—False Representations—Mere Opinions—Equal Opportunity to Know Truth.**—Statements consisting of mere matters of opinion do not constitute false and fraudulent representations such as will form the basis of an action for damages by one who entered into a contract in reliance upon their truth, especially where both parties had equal or fair opportunity to know the truth, pp. 300, 301.

Reaffirmed in Riley v. Bell, 120 Iowa 627, 628, 95 N. W. 173.

Reaffirmed in McClanahan v. McKinley, 52 Iowa 223, 2 N. W. 1101, being an action in equity to cancel a contract because of false and fraudulent representations.

Reaffirmed and explained in Hoffman v. Wilhelm, 68 Iowa 515, 27 N. W. 485, holding that mere opinions or statements as to value

of the subject of a contract, do not constitute false representations and will not avoid it, p. 237.

Reaffirmed and explained in *Ladner v. Balsley*, 103 Iowa 678, 72 N. W. 788, holding that if false representations are made regarding matters of fact, and the means of knowledge are equally open to both parties, and then one party, instead of informing himself, sees fit to put himself in the hands of the other, whose intention is to mislead him, the law will give him no remedy for his injury; but that the question as to whether the injured party acted with due care and prudence in relying upon the representation of the other is a question for the jury, and not for the court.

Distinguished and narrowed in *King v. Sioux City Loan & Investment Co.*, 76 Iowa 15, 16, 39 N. W. 921, holding that sworn answers as to the value of land, made by the owner for the purpose of securing a loan through the medium of a loan company, constitutes fraud.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

GREENLEAF, ADM'R, *v.* DUBUQUE & SIOUX CITY R. R. CO., 30 IOWA 301

1. **Evidence—Hearsay—Pedigree—Entry in Family Bible as—Admissibility.**—The date of a birth and death of an individual, being matter of pedigree, may be proved by hearsay evidence and general repute in his family; and an entry of a *deceased* parent, made in a Bible, is regarded as a declaration of the parent making the entry and therefore admissible, pp. 302, 303.

Reaffirmed and explained in *State v. Trusty*, 122 Iowa 86, 97 N. W. 991, holding that before declarations of a deceased kinsman (in this case a grandfather and an uncle) are admissible to prove an age of a person, it must be shown that the declarant is dead.

JOHNSON *v.* CHASE, 30 IOWA 308

(Case arising out of same transaction, 38 Iowa 496.)

1. **Tax Sale of Land—Sale of Several Parcels in Gross—When Valid and When Void.**—Where land is properly and legally assessed *in a body* instead of in parcels, it may be sold for taxes in gross; but if separate parcels of land are assessed separately, or are in fact distinct and separate, a sale thereof in gross is void.

So the fact that a quarter-section of land is assessed and sold for taxes in three parcels, instead of as a whole, does not invalidate the sale, pp. 309, 310.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under *Corbin v. De Wolf* (25 Iowa 124), ante. p. 244.

2. **Tax Sale of Land—Insufficient Tax Warrant—Effect on Sale and Tax Deed.**—The fact that a tax warrant under which a

sale of land for taxes is had, had no seal affixed thereto, or was issued without authority from the county board of supervisors, does not—under the Code of 1860—affect the validity of the sale or deed made thereunder, p. 310.

Reaffirmed and extended in C. R. & M. R. R. Co., & I. R. L. Co. v. Carroll County, 41 Iowa 173, holding further that a valid tax sale of land may be had, even without a tax warrant having issued.

Cross Reference. See further on this question annotations under Rule 3 of *Parker v. Sexton & Son* (29 Iowa 421), ante. p. 543.

WALKER v. SLEIGHT, 30 IOWA 310

1. Action on Writing—When Plaintiff Must Prove Signature to.—Under Chap. 28, Acts of 1868 (9th General Assembly), repealing Sec. 2967 of the Code of 1860, where the *party whose signature purports to be to the writing* sued on, or pleaded, denies the same under oath, in the time and manner prescribed, the plaintiff must prove the genuineness of the signature by competent evidence, p. 324.

Reaffirmed in Marshall Field Co. v. Oren Ruffcorn Co., 117 Iowa 160, 90 N. W. 619, under Sec. 3640 of the Code of 1897, corresponding to the law of the text.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

PETERSON v. FERREBY, SHERIFF, 30 IOWA 327

1. Railroads—Condemnation for Right of Way—Appeal by Railroad from Assessment of Damages—Effect—Mandamus.—Where a railroad company appeals from an assessment of damages for a right of way by a sheriff's jury, but deposits the amount thereof with the sheriff, the land owner has no right to demand payment of the money deposited, until after the trial of the appeal; and he cannot, therefore, compel the sheriff, by mandamus, to make such payment pending the appeal.

Reaffirmed and extended in Burns v. C. Ft. Mad. & D. M. Ry. Co., 102 Iowa 11, 12, 70 N. W. 730, holding further that where both the land owner and the railroad company appeals to the district court from an assessment of damages to the land owner by a sheriff's jury in a proceeding to condemn land for a railroad right of way, that the acceptance thereafter and before trial of the appeal, by the land owner of the amount allowed him by such jury, does not preclude him from recovering a larger amount of damages on the trial of the cause *de novo* in the district court, to be credited by the amount of the first assessment.

STATE v. BURKE, 30 IOWA 331

1. **Homicide—Self Defense—Great Bodily Harm from Felonious Assault.**—The law gives a person the same right to use such force as may be reasonably necessary, under the circumstances by which he is surrounded, to protect himself from *great bodily harm*, as it does to prevent his life being taken; and he may excusably use this necessary force to save himself from any felonious assault, p. 334.

Reaffirmed and explained in State v. Fraunburg, 40 Iowa 557, holding that the law gives a person the same right to use such force as may be reasonably necessary, under the particular circumstances, to protect himself from *great bodily harm*, as it does to save his life.

Cross Reference. See further on this question, annotations under State v. Neely (20 Iowa 108), Vol. II, p. 786; Rule 2 of State v. Thompson (9 Iowa 188), Vol. I, p. 560.

FOX v. DOHERTY, 30 IOWA 334

1. **Lands—Resulting Trust in—Widow Buying Land with Fund of Deceased Husband.**—Where a widow buys land with the funds or property of her deceased husband, and takes the title in herself, she will be held to hold in trust for her husband's heirs, pp. 335, 336.

Reaffirmed in Zunkel v. Colson, 109 Iowa 697, 81 N. W. 175.

Distinguished in Burden v. Sheridan, 36 Iowa 128, 14 Am. Rep. 505, the court holding that no trust results in favor of a person who has paid no part of the purchase money of land, on account of the breach of a verbal contract in relation thereto; and parol evidence is admissible to prove such a contract.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

Cross Reference. See further on this question, annotations under Sunderland v. Sunderland (19 Iowa 325), Vol. II, p. 734.

MCNAUGHT v. C. & N. W. R. R. Co., 30 IOWA 336

1. **Appeal—Law Action—Question Not Raised Below Not Reviewed or Considered.**—Questions not raised, passed on and excepted to below will not be reviewed or considered by the Supreme Court upon appeal in an action at law, pp. 337, 338.

Reaffirmed in Trayer v. Reeder, 45 Iowa 273.

Cited in Heaton v. Fryberger, 38 Iowa 207 (dissenting opinion), the majority court opinion not in point.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

2. **Railroad Companies—Liability for Killing or Injuring Stock—Double Liability—Notice and Affidavit for—How Served—Time Allowed Company to Pay.**—Under Chap. 169, Acts of 1862

(9th General Assembly) in order to fix double liability for killing or injuring stock the railroad company is entitled to notice in writing, to be accompanied by the *original* affidavit of the owner of the stock.

And the company is allowed thirty days after such notice is given in which to pay the claim, pp. 338, 339.

Reaffirmed as to first paragraph in Keyser v. K. C., St. J. & C. B. R. R. Co., 56 Iowa 441, 9 N. W. 339.

Reaffirmed and explained as to first paragraph in Campbell v. Ch. R. I. & P. R. R. Co., 35 Iowa 334, 335; Cole v. C. & N. W. R. R. Co., 48 Iowa 312, holding that service of the notice and affidavit by reading the originals to and delivering copies thereof to the agent of the railroad company, is insufficient to fix double liability for killing or injuring stock.

Reaffirmed and explained as to first paragraph in Kyser v. K. C., St. J. & C. B. R. R. Co., 56 Iowa 208, 9 N. W. 133, holding that under Sec. 1289 of the Code of 1873, corresponding to the section of the text, the original affidavit must be served upon a railroad company or its agent and a copy introduced in evidence, unless other lawful evidence is admissible in lieu of a copy under the circumstances of the case.

Reaffirmed and explained as to first paragraph in Brentner v. C. M. & St. P. R. R. Co., 58 Iowa 626, 627, 12 N. W. 615, holding that in an action by the owner of stock killed or injured by a railroad company, the plaintiff may prove the service of the notice and original affidavit on the defendant, by the introduction of exact copies thereof and proof of the fact of service.

Cited in Ware v. Dellahaye & Purdy, 95 Iowa 679, 64 N. W. 644; McGillivray Bros. v. Dist. Township of Barton, 96 Iowa 633, 65 N. W. 975, the court holding—as does the present case in argument—that wherever a statute gives a right, or lien upon performance of certain conditions, strict compliance therewith is required.

Partially overruled in Van Slyke v. Ch., St. P. & K. C. Ry. Co., 80 Iowa 624, 45 N. W. 397, holding that the *notice* set out in the text, may be served by leaving a copy thereof with the agent of the company—but this case does not change the rule as to service of the *original* affidavit.

SULLY v. NEBERGALL, 30 IOWA 339

1. Wills—Widow's Election to Take under Will—When Does Not Bar Right to Dower.—A widow of a deceased testator is not barred of her right to take dower in his real estate by electing to take under his will in the following language, to-wit: "I give and bequeath to my beloved wife, H. H., all my estate, consisting of 170 acres of land, together with all my personal property (after paying my debts), during her life, or so long as she remains my widow. And if she should be disposed to sell the estate and improve other lands, she

is at liberty to do so; and at her death or marriage the estate is to be equally divided between my heirs," p. 341.

Reaffirmed and explained in Mettier v. Wiley, 34 Iowa 216; Watrous v. Winn, 37 Iowa 74; McGuire v. Brown, 41 Iowa 655; Van Guilder v. Justice, 56 Iowa 670, 10 N. W. 238; Potter v. Worley, 57 Iowa 68, 7 N. W. 685; Daugherty v. Daugherty, 69 Iowa 679, 680, 29 N. W. 779; Herr v. Herr, 90 Iowa 540, 58 N. W. 898; Bare v. Bare, 91 Iowa 145, 59 N. W. 21; Parker v. Parker, 129 Iowa 603, 106 N. W. 9; Archer et al. v. Barnes, 149 Iowa 661, 128 N. W. 970, the court holding that where there is no express declaration in the will barring the dower of the wife, the intention that it shall be barred must be deduced by clear and manifest implication from the instrument, founded on the fact that the claim of dower would be inconsistent with the will or so repugnant to some of its dispositions as to disturb and defeat them.

Reaffirmed and qualified in Van Guilder v. Justice, 56 Iowa 670, 10 N. W. 238; Hunter v. Hunter, 95 Iowa 732, 58 Am. St. Rep. 455, 64 N. W. 657, the court holding that in the absence of provisions to the contrary in the will, the dower must be allowed unless to do so would be "inconsistent with and will defeat some of the provisions of the will."

(Note.—There are numerous cases sustaining, but not citing the text, and its annotations.

N. B.—As each will is dependent for its construction upon the language employed, etc., no *syllabi* of the provisions of wills in the annotations hereof are given.—Ed.)

Cross References. See further on this question, annotations under Rule 3 of Shields v. Keys, Adm'r (24 Iowa 298), ante. p. 183; Cain v. Cain (23 Iowa 31), ante. p. 78; Corriell v. Ham (2 Iowa 552), Vol. I, p. 242.

2. Limitation of Actions—Action by Widow or Her Assignee to Recover Dower—Assignment or Admeasurement of Dower.—Under Sec. 3605 of the Code of 1860, the statute of limitation does not commence to run against an action by a widow or assignee of her dower, to recover possession thereof, until the heir, tenant in possession, or other person claiming an adverse right or interest in the land, either denies the dower interest, or does some act equivalent to such denial.

But an action by a widow to admeasure or have dower assigned is barred unless commenced within ten years after the death of the husband.

This rule applies to an action in equity by the grantee of a widow to recover a dower interest in land.

The limitation of ten years from the husband's death on this subject in the Code of 1860, applies only to proceedings in the county court, p. 342.

Reaffirmed as to first paragraph in Felch v. Finch, 52 Iowa 564, 3 N. W. 571.

Reaffirmed and narrowed in Britt v. Gordon, 132 Iowa 439-441, 11 Am. & Eng. Ann. Cas., 407, 108 N. W. 322, holding that an action by a widow to recover, or for the assignment of dower, against one who holds possession of land through or under her husband, or adverse to her rights, is barred ten years after the death of her husband—under the Code of 1897.

Cross References. See further on this question, annotations under Rule 5 of *Rice v. Nelson* (27 Iowa 148), ante. p. 379; Rule 1 of *Starry v. Starry* (21 Iowa 254), Vol. II, p. 899.

BELLER v. MARCHANT, 30 IOWA 350

1. Contracts—Infancy—Infant Representing or Holding Self Out as of Majority—When Infant's Contract Binding.—Under Sec. 2541 of the Code of 1860, where an infant, at the time of making a contract, represents himself to be of full age, when he is not, and thereby deceives the other contracting party, he is estopped from taking advantage of his infancy. Or if, from the minor having engaged in business as an adult, the other party *had good reason to believe* the minor to be of contracting age, the latter cannot set up his infancy as a defense to an action on his contract thus entered into.

But when the fact of infancy is known to the other contracting party at the time of contracting, this rule does not apply, pp. 351, 352.

Reaffirmed as to first paragraph in Jaques v. Sax, 39 Iowa 370,

FARLEY v. FARLEY, 30 IOWA 353

1. Divorce and Alimony—Decree as to Alimony—Power and Duty of Chancellor.—Upon a decree granting a wife a divorce, the chancellor may award her such alimony as is reasonable under the facts and circumstances of the case; but the decree must provide as to the time and manner of payment of the amount allowed so as to avoid the sacrifice of the defendant's (husband's) property.

No fixed rule governs the amount of alimony to be allowed, but this is to be determined by the chancellor from the facts and circumstances of each case, p. 354.

Reaffirmed and explained in Zuver v. Zuver, 36 Iowa 194-197, holding that under Sec. 2537 of the Code of 1860, the chancellor is authorized upon decreeing a divorce to make a just and proper order respecting both permanent alimony to the wife and the custody of the children, although the pleadings contain nothing in reference thereto.

SHAW v. ORR, 30 IOWA 355

1. Statutes—When Deemed Directory—Statutes Prescribing Manner, etc., of Officers Discharging Duties—Manner of Listing

and Assessing Land for Taxes.—Statutes prescribing the manner and time of the discharge of duties by public officers are directory, and want of compliance therewith does not render official acts void.

This rule applies to the provisions of the statute Chap. 137, Acts of 1868 (12th General Assembly) in reference to the time and manner of listing and assessing land for taxation, p. 359.

Reaffirmed and explained in Phelps v. Mead, 41 Iowa 472, 473, 475, holding that a tax deed is conclusive evidence of the due performance and regularity of every step and proceeding in tax sales, as to time, manner of sales, etc.; that no matter how informal or irregular the sale may have been conducted by the treasurer, if there was a *bona fide* sale, in substance or in fact, the tax deed is conclusive evidence that it was done at the proper time and manner, these being merely directory and not fundamental: Holding, also, that an error or irregularity in the manner of a sale of land for taxes and an error in the tax deed, as to the day the sale was made, does not affect the validity of the tax title: That a tax deed of land made more than three years after the tax sale, is valid.

Cited in State v. Brandt, 41 Iowa 618 (dissenting opinion); the majority court holding that an indictment will not be set aside because of irregularities in the selection of the grand jury, where they do not affect or prejudice the substantial rights of the accused: A substantial compliance with the statute is all that is required—and so holds, also, State v. Carter, 144 Iowa 376, 121 N. W. 802; State v. Heft, 148 Iowa 619, 620, 127 N. W. 831, citing the text.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

Cross Reference. See further in this connection annotations under McCready v. Sexton & Son (29 Iowa 356), ante. p. 539.

2. Tax Sales—Statute in Relation to Exclusive—Sale without Tax Warrant.—The statute in relation to sales of property for taxes is exclusive and must be strictly pursued.

So a tax sale under Chap. 137, Acts of 1868 (12th General Assembly), is valid without a tax warrant issuing, the statute not requiring it, p. 361.

Reaffirmed and explained as to first paragraph in Crawford County v. Laub, 110 Iowa 356, 357, 81 N. W. 591, holding that the remedies and manner of proceeding to collect the tax under Chap. 62 Acts of 1894 (25th General Assembly), known as the "mulct law," are exclusive, and precludes an action in equity therefor, or to enforce the lien allowed therein.

3. Taxation and Revenue—Vendor and Purchaser—When Vendor Liable to Pay Taxes on Land.—Under Chap. 110, Acts of 1862 (9th General Assembly), as between vendor and vendee taxes become a lien on land as of the 1st day of November: But where taxes

are levied upon lands, and after the first day of November the owner sells part thereof, he is liable, the tax collector having no authority to apportion the taxes, p. 360.

Cited in *Bailies, Gd'n, v. City of Des Moines*, 127 Iowa 125, 102 N. W. 813, the case turning on another point.

Cited in *Marshall County v. Knoll*, 102 Iowa 577, 69 N. W. 1147, not in point, but upon analogy.

MOULTON *v.* WALSH, 30 IOWA 361

1. Actions—Statute of Limitation—When Can be Raised by Demurrer.—Under Sec. 2961 of the Code of 1860, in order to enable a party by demurrer to insist upon the bar of the statute of limitations, the petition must show affirmatively that its cause of action is so barred, p. 362.

Reaffirmed in *Shearer v. Mills*, 35 Iowa 502; *Brown v. Rockhold*, 49 Iowa 284, 285.

ALLEN *v.* HARRAH, 30 IOWA 363

1. Negotiable Promissory Note—Indorser of—Waiver of Demand and Notice of by—Promise to Pay by Indorser as Waiver.—Where an indorser of a negotiable promissory note promises to pay it after it is due and with full knowledge that no demand has been made on the maker, he thereby waives such demand and notice, and the indorser is bound without them, p. 369.

Reaffirmed in *Lomax v. Smyth & Co.*, 50 Iowa 229.

Reaffirmed and explained in *Freeman v. O'Brien and Cash*, 38 Iowa 410, holding that an indorser of a negotiable instrument may waive the objection of a want of due presentment and notice, by a promise to pay the same made after default, but in order to make such a waiver binding "it must be clearly established and deliberately made after a full knowledge of the facts," and it will not be presumed or implied from doubtful circumstances, or sudden acknowledgments, or hasty expressions; and the party alleging the promise must also allege and prove that it was made with a full knowledge of the fact that the promisor was released from legal obligation to pay the same.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

Cross Reference. See further on this question, annotations under *Hughes v. Bowen* (15 Iowa 446), Vol. II, p. 362.

2. Negotiable Note—Sufficiency of Demand on Makers—Demand on One of Two Makers.—Where a negotiable note is made payable in a foreign state, a demand on one of two makers thereof made in that state, and protest or notice thereof had in that state, is sufficient to bind the indorser thereof in an action on the note in this state, when, by the laws of that state, such demand, protest and notice

is sufficient. But the doctrine as applied to inland bills of exchange and domestic negotiable notes governed by the law of this state, is not determined, pp. 370, 371.

Special Cross Reference. For cases citing and qualifying the text, see annotations under *Blake v. McMillen* (22 Iowa 358), ante. p. 41.

HARLIN v. STEVENSON, 30 IOWA 371

1. Executors and Administrators—Collateral Attack of Settlement—Money Disbursed by Administrator on Advice of Probate Judge—Confirmation by Later Settlement Including—Effect.—Where an administrator pays out money upon oral advice of the probate judge, and it is included in a later settlement with the court which is approved, such fact will not be ground for collateral attack of the settlement, p. 374.

Distinguished in *In re Kimble v. Dailey*, 127 Iowa 668, 669, 103 N. W. 1010, holding that oral advice of the judge, outside of court, to a guardian to pay out money or otherwise manage the ward's property, and which is not later confirmed by a settlement with the court, is no protection to the guardian.

2. Fraudulent Conveyances—Death of Fraudulent Grantor—Rights of Creditors—Duty of Administrator.—It is the duty of an administrator of a fraudulent grantor to bring an action in equity to set aside the conveyance as fraudulent, and have the property subjected to the debts of all the creditors of decedent; But his failure to do so does not prevent such a creditor from bringing an action in equity against the grantee in the fraudulent conveyance to set it aside as fraudulent and subject the property to the satisfaction of his debt: And the fact that the debt of the plaintiff (creditor) was never filed as a claim against the estate of decedent, is no defense in favor of the defendant (grantee), p. 375.

Reaffirmed and explained in part in *Hansen's Empire Fur Factory v. Long*, Adm'r, 104 Iowa 370, 371, 73 N. W. 878, holding that where an administrator brings an action in equity to set aside a conveyance of his decedent as fraudulent, and is denied the relief therein, he represents all the creditors of his decedent whose debts the property would be subject to the satisfaction of; and the decree therein binds all such creditors.

Reaffirmed and varied in *Crary, trustee, v. Kurtz*, 132 Iowa 111-113, 119 Am. St. Rep. 549, 105 N. W. 592, holding that a trustee in bankruptcy may, when necessary to pay debts of a bankrupt, bring suit to set aside fraudulent conveyances of the bankrupt to land, without reducing the claims to be paid, to judgment.

Cited in *Westcott v. Sioux City*, 141 Iowa 459, 119 N. W. 751, the court holding that in an action by a creditor against the grantee in

a conveyance, to set it aside as fraudulent, the grantor (debtor) is a proper, but not a necessary party.

Cross reference. See further on this question, annotations under Cooley, Adm'r, v. Brown (30 Iowa 470), *infra.* p. 625.

3. Actions—Statute of Limitation—Party Pleading Must Prove it—Fraud.—The defense of the statute of limitation is an affirmative one, and the party pleading must show facts constituting a bar by it.

So where a creditor sues in equity to set aside a conveyance as fraudulent, when the conveyance was executed more than five years next before the action is commenced, the defendant who pleads the statute of limitation as a defense, must prove that the action was not commenced within five years next after the discovery of the fraud by the plaintiff; as under Secs. 2740, 2741, of the Code of 1860, the action is not barred until such time, pp. 375, 376.

Reaffirmed in Evans v. Montgomery, 50 Iowa 332, 333; Faust v. Hosford, 119 Iowa 100, 93 N. W. 59, under the Codes of 1873 and 1897.

Reaffirmed as to first paragraph in Nicodemus v. Young, 90 Iowa 429, 430, 57 N. W. 908; Jenks v. Lansing Lumber Co., 97 Iowa 349, 66 N. W. 233; McDonald v. Bice 113 Iowa 45, 84 N. W. 986; Belken v. City of Iowa Falls, 122 Iowa 431, 98 N. W. 297; Borghart v. City of Cedar Rapids, 126 Iowa 317, 68 L. R. A. 306, 101 N. W. 1121, all holding that the statute of limitation is an affirmative plea; and that the party relying thereon must plead and prove facts constituting the bar.

AUSTIN v. THORP, 30 IOWA 376

1. Principal and Agent—Power to Agent to Lend Money, Power to Collect not Implied from.—Power given to an agent to lend money and take securities therefor does not impliedly grant authority to him to collect the money, p. 378.

Reaffirmed and explained in State v. Cooper, 102 Iowa 149, 71 N. W. 198, holding that the mere employment to negotiate a loan will not authorize the receipt of the proceeds thereof by the agent for his principal.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

LOOMIS & LEROY v. METCALF & FULLER, 30 IOWA 382

1. Promissory Notes—Latent Defenses—Fraud in Obtaining Signature—Rights of Innocent Holder.—Fraud in obtaining the signature of a maker to a promissory note, and other latent defenses, cannot be made defenses in an action against the maker by an innocent

holder for value, who took before maturity and without notice of such fact or facts, p. 385.

Reaffirmed and explained in Lay v. Wissman, 36 Iowa 308, 309, holding that the holder of commercial paper who took for value, before maturity, in the usual course of business, and without knowledge that it was without consideration and that the signature of the maker was obtained by fraud, may recover of the maker the full amount of the note, although he (the holder) paid less than the face value therefor.

2. Promissory Note—Action on—When Plaintiff Required to Prove Genuineness of Signature to.—Before the plaintiff in an action on a promissory note is required to prove the genuineness of the signature of the defendant (maker) thereto, the defendant (maker), must, under the Act of March 10, 1862 (9th General Assembly), in his answer specifically deny, under oath, the genuineness thereof, pp. 384, 385.

Reaffirmed in Douglas v. Matheny, 35 Iowa 113, 114.

Reaffirmed and qualified in Sankey v. Trump, 35 Iowa 267, 268, holding that where one who is sued as the maker of a promissory note, denies the execution and delivery thereof in his answer, but not under oath, then although the plaintiff is not required to prove the genuineness of defendant's signature, the defendant may prove that he did not sign it.

Cross references. See further on this question, annotations under Rule 1 of Hall v. Ætna Mfg. Co. (30 Iowa 215), ante. p. 587; Clinton Nat'l Bank v. Torrey (30 Iowa 85), ante. p. 573.

THOMPSON v. MINER, 30 IOWA 386

1. Lands—Easement—Conveyance or Grant—Easement Passes With Land by Implication, When.—An easement is an appurtenance to the land it benefits, and passes by descent, or by a devise or a conveyance of the land, even though it be not mentioned in the subsequent instrument.

So where a person purchases a building with knowledge of its plan and construction, and of the common use of a passage-way and stairway by his vendor and a third person, or third persons, he is charged with notice of the easement of the latter, and takes subject to his or their rights, pp. 389, 390.

Reaffirmed as to first paragraph in Price v. Baldauf, 82 Iowa 675, 676, 46 N. W. 985; Teachout v. Capital Lodge of I. O. of Odd Fellows, 128 Iowa 384, 104 N. W. 442; Teachout v. Duffus, 141 Iowa 468, 469, 119 N. W. 984.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 4 of Karmuller v. Krotz (18 Iowa 352), Vol. II, p. 646.

2. Vendor and Purchaser—Possession of or Use of Land by Third Person—Constructive Notice.—Where one purchases land with knowledge that it is in the possession of another than his vendor, or that such person is using and claiming an easement thereover, or therein, he (the purchaser) is charged with notice of the rights or interest of the third person, p. 390.

Reaffirmed and explained in Phillips v. Blair, 38 Iowa 656, holding that actual possession by a purchaser of real estate under a parol contract of purchase thereof, operates as constructive notice of his title or equity therein to subsequent purchasers and other persons dealing therewith adversely to him.

Cross reference. See further on this question, annotations and cross references under Dickey v. Lyon (19 Iowa 544), Vol. II, p. 763.

STATE v. STEVENS, 30 IOWA 391

1. Criminal Conspiracy—Indictment for—Allegations of.—An indictment for criminal conspiracy must allege and show that the object of the conspiracy, or the means to be employed in its accomplishment were unlawful. And an indictment for criminal conspiracy where the object is not criminal, must specifically charge the means by which it was to be accomplished and thus show that the means to be employed were criminal, pp. 393-395.

Reaffirmed in State v. Harris, and Fulsom., 38 Iowa 248, 249; State v. Clemenson, 123 Iowa 526, 99 N. W. 139; State v. Eno, 131 Iowa 620, 9 Am. & Eng. Ann. Cas. 856, 109 N. W. 119; State v. Hardin, 144 Iowa 270-272, 120 N. W. 473.

Reaffirmed and narrowed in State v. King, 104 Iowa 729, 74 N. W. 692, holding that in order to constitute criminal conspiracy, the combination must contemplate the accomplishment of the criminal purpose by the united energy of the accused persons, or active participation by them must be shown: That mere knowledge, acquiescence, or approval of an act, without co-operation or an agreement to co-operate, does not constitute the crime of conspiracy.

Reaffirmed and narrowed in State v. Loser, 132 Iowa 425, 104 N. W. 339, holding that an indictment for conspiracy to do a criminal act need only describe the act by the name and term it is known in the law: That the gist of the offense in such a case, is the unlawful combination or agreement, and no overt act is necessary to complete the offense, and such an act need not be alleged in the indictment.

Cross reference. See further on this question, annotations under Rule 1 of State v. Potter (28 Iowa 554), ante. p. 483.

CHILDS v. LIMBACK, 30 IOWA 398

1. Actions—Defective Original Notice—Appearance Waives.—The entry of appearance by defendant in an action, cures or waives all defects in the original notice, p. 399.

Reaffirmed and extended in Kilmer v. Gallaher, 116 Iowa 669, 88 N. W. 960, holding further that appearance by defendant waives service of notice.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

2. Pleading—Demurrer in General Terms in Law Action to be Disregarded.—Under Sec. 2877 of the Code of 1860, a demurrer in an action at law which is in general terms, and does not state the objections to the pleading, will be disregarded, p. 400.

Reaffirmed and explained in Stokes v. Sprague, 110 Iowa 93, 81 N. W. 196; Robinson v. Grant & Son, 119 Iowa 574, 575, 93 N. W. 587, holding that, under Sec. 3562 of the Code of 1897, corresponding to the section of the text, a demurrer in an action at law must specify and number the grounds of objection to the pleading; and that a demurrer in such an action in the terms of sub-division 5 of Sec. 3561 of that Code—that the facts do not constitute a cause of action, or defense,—is insufficient, and must be overruled.

(Note.—There are numerous cases under the various codes, sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 1 of Dav. Gas L. & Coke Co. v. City of Davenport (15 Iowa 6), Vol. II, p. 295.

ROBINSON v. ILLINOIS CENTRAL R. R. CO., 30 IOWA 401

1. Trial—Instructions—Province of Jury.—Where there is evidence to support an issue, its sufficiency is for the jury to determine, p. 404.

Reaffirmed and explained in In re Knox's Will, 123 Iowa 29, 98 N. W. 470, holding that it is reversible error for the trial court to instruct the jury on the degree or importance to be attached to any part of oral evidence, or any circumstance involved in a trial.

Reaffirmed and explained in Madden v. Sylor Coal Co., 133 Iowa 707, 111 N. W. 60, holding that it is never the province of the court to say to the jury what evidence shall or shall not be given weight; and it is always dangerous for a trial court to indicate to the jury, by instruction or otherwise, his own conclusion as to where the weight of the testimony lies: That the credibility of witnesses and the weight and sufficiency of the evidence, are matters for the determination of the jury under the law as given to them by the court.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

DOBSON v. DOBSON, 30 IOWA 410

1. Descent and Distribution—Widow of Testator Dying Without Issue, Rights of—Section 2495 of the Code of 1860, construed.—Section 2495 of the Code of 1860, providing that if the intestate leave

no issue, the one-half of his estate shall go to his parents and the other half to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents, has no application to the estate of a husband who died without issue leaving a will disposing of his entire estate; and his widow is not entitled to one-half distributive share of his real estate thereunder, p. 411.

Reaffirmed and explained in Wright v. Breckinridge, 125 Iowa 201, 101 N. W. 113, holding that where a husband dies without issue leaving a will disposing of his entire estate, upon renunciation of the will by the widow she takes—under the Code of 1873—only one-third of the real estate of her husband.

Reaffirmed and explained in Hastings v. Day, 151 Iowa 45, holding—under Sec. 3379 of the Code of 1897—that the law has provided for each consort a fixed share in the other's estate which cannot be taken away or diminished by will or other act of his or her consort; that subject to that right, each may, by will, freely dispose of all the rest of his or her estate to others, and under our statute it is only in case of failure to thus devise or bequeath the entire estate over and above the dower or statutory provision for a surviving consort that he or she takes anything whatever by way of inheritance.

Unreported citation, 130 N. W. 137.

BARKER v. ROLLINS, 30 IOWA 412

1. Homestead—Sale under Decree Foreclosing Mortgage to Which It Is Subject—Rights of Purchaser from Mortgagor.—Where one purchases homestead which is subject to the satisfaction of a mortgage on it and other land, and with notice, actual or constructive, of the mortgage, he cannot insist that the other property mortgaged be first exhausted before the homestead be sold under a decree of foreclosure of the mortgage, as provided by Sec. 2281 of the Code of 1860. Such section grants a personal right or privilege to the mortgagor, and has no application to third persons or purchasers with notice, p. 413.

Reaffirmed in Kemerer v. Bournes, 53 Iowa 176, 4 N. W. 924, under the Code of 1873.

Distinguished in Bankers' Life Ass'n v. Engelson, 148 Iowa 597-599, 126 N. W. 953, holding that where homestead and other real estate is mortgaged, and thereafter another person takes another mortgage on such property except the homestead, the latter cannot insist that the homestead be first sold under decree of foreclosure of the senior mortgage, nor can he object to or claim any rights by reason of the mortgagor conveying the homestead to the senior mortgagee or to any other person.

STOUT & CO. v. NOTEMAN, 30 IOWA 414

1. Negotiable Promissory Note—Action against Indorser and Maker—Venue.—An action against an indorser and the maker of a negotiable promissory note may—under Sec. 2800 of the Code of 1860—be brought in the county in which the indorser lives, although the maker does not reside therein, p. 415.

Cited in Swartley v. Oak Leaf Creamery Co., 135 Iowa 577, 113 N. W. 498, the court holding that the maker and the indorser of a negotiable note may be either jointly or severally sued, under Sec. 3465 of the Code of 1897; and that this rule applies to corporations as well as to individuals.

Partially overruled in Darling v. Blazek, 142 Iowa 357, 120 N. W. 961, holding that under Sec. 3501 of the Code of 1897, an action in which the makers of a negotiable note if residents of this state, are sought to be impleaded as defendants, shall be brought in a county where one or more of them resides; that this provision in no manner abrogates the rule by which it is allowable to join the indorser as a defendant, even though he happens to reside in another county.

LAKE v. GRAY, 30 IOWA 415

(Later appeal, 35 Iowa 459.)

1. Conveyance—Binding Between Parties Without Acknowledgment or Recording.—A conveyance is binding as between the parties thereto although it be neither acknowledged nor recorded, p. 419.

Reaffirmed and extended in Waterhouse v. Black, 87 Iowa 319, 320, 54 N. W. 343; Kruger v. Walker, 94 Iowa 511, 63 N. W. 322, holding further that a deed or other conveyance is valid as between the parties and as to all persons having knowledge or notice thereof, although it be not acknowledged or recorded.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

GANDY v. CHICAGO & NORTHWESTERN R. R. Co., 30 IOWA 420, 6 AM. REP. 682

1. Railroads—Fire Set from Sparks from Engine—Action for Damages—Negligence—Burden of Proof.—In an action for damages against a railroad company for damages for injury to or destruction of property caused by a fire set from sparks from an engine, the burden of proof is on the plaintiff to prove the negligence of the defendant; but this proof may be made from facts and circumstances which might not be sufficient in cases capable of clearer proof.

The absence of a spark arrester; the failure to use the best; the employment of a drunken engineer; the use, at the time, of an excessive amount of steam; an extraordinarily heavy train; an unlawful rate of speed; a defect or want of repair in the engine; the stopping

of the engine or stirring the fire in it in a place of peculiar peril; the repeated and unusual dropping of coals or excessive and continued emission of sparks, etc., are severally facts tending more or less satisfactorily according to the circumstances to establish the fact of negligence.

But the mere fact of injury to or destruction of property by a fire set by sparks from an engine does not make a *prima facie* case of negligence on the part of the defendant, pp. 421, 422.

Reaffirmed in McCumious v. Ch. & N. W. Ry. Co., 33 Iowa 188; Garrett v. Ch. & N. W. Ry. Co., 36 Iowa 122, 123.

Reaffirmed in Glanz v. Ch. M. & St. P. Ry. Co., 119 Iowa 612-614, 93 N. W. 576, being an action for personal injuries caused by attempting to extinguish a fire set by sparks from an engine.

Reaffirmed and varied in Doulon v. City of Clinton, 33 Iowa 398, 399, holding that negligence must be affirmatively shown, and the mere existence of a defect in the sidewalk is not enough to establish negligence on the part of the city; that it must in some way be connected with the defect, either as having directly caused it, or having assented to its creation by another, or as having, with a knowledge of its existence, permitted it to remain.

Reaffirmed and varied in Denton v. C. R. I. & P. R. R. Co., 52 Iowa 162-164, 35 Am. Rep. 263, 2 N. W. 1095, holding that in an action against a common carrier as *warehousemen* for the value of goods destroyed by fire after they had been transported and had reached their destination, the plaintiff must aver and prove negligence on the part of the defendant.

Cited in Babcock v. Ch. & N. W. Ry. Co., 62 Iowa 595, 596, 13 N. W. 741, the court holding that after the plaintiff has established a *prima facie* case of negligence—under Sec. 1289 of the Code of 1873—by proof that his property was destroyed by a fire set from sparks from an engine, the defendant (railroad company) must disprove its negligence, whereupon the plaintiff may rebut the testimony of defendant, by either direct or circumstantial evidence.

Cited in Case v. Ch. R. I. & P. Ry. Co., 64 Iowa 763, 21 N. W. 30, the court holding that where the defendant is charged with negligence in the use of a structure which has become defective, it is incumbent on the plaintiff to prove that the defect came to the knowledge of the defendant, or existed for such a length of time that knowledge should be presumed.

Cited in O'Connor v. Ill. Cent. Ry. Co., 83 Iowa 111, 48 N. W. 1004, the court holding that in an action for damages for personal injuries caused by the alleged negligence of the defendant, the burden is on the plaintiff to prove the negligence.

Cited in Connors v. Ch. & N. W. Ry. Co., 111 Iowa 385, 82 N. W. 953, the court holding that when property is destroyed by reason of a fire set by sectionmen in burning grass from the right of way of

a railroad, the owner of the property who sues the company for damages must affirmatively show negligence; and that proof by plaintiff of the fire so set and the consequent destruction of the property, does not make out a *prima facie* case of negligence, shifting the burden to defendant to disprove it.—Sec. 1289 of the Code of 1873 not applying to such a case.

Cited in Duree v. C. M. & St. P. Ry. Co., 118 Iowa 642, 92 N. W. 890, the court holding that in an action against a railroad company for the loss of an eye caused from a spark or cinder emitted from an engine, the plaintiff must affirmatively show negligence of the defendant—and that Sec. 2056 of the Code of 1897, corresponding to Sec. 1289 of the Code of 1873, shifting the burden of proof of negligence, has no application in such case: And holding that the emission of particles of coal or sparks, not unusual in size or quantity, will not, alone, warrant the inference of negligence, either in the improper management of the engine, or its lack of equipment with appliances of approved efficiency.

Partially overruled in Small v. C. R. I. & P. R. R. Co., 50 Iowa 339, 340, 347, 348, holding that under Sec. 1289 of the Code of 1873, proof of destruction of property by fire set by sparks from an engine makes a *prima facie* case of negligence, and shifts the burden of proof to the defendant (railroad company) to disprove its negligence or to prove contributory negligence on the part of the plaintiff.

Unreported citation, 10 N. W. 862.

Cross reference. See further on this question, annotations under Rules 2 & 3 of Kesse v. Ch. & N. W. R. R. Co. (30 Iowa 78), ante. p. 572.

JUDD v. MOSELY, 30 IOWA 423

1. Actions—Service of Original Notice by Publication—Action against Non-Resident Minors.—In an action against non-resident minors, where the Code allows service of original notice by publication in such an action against non-resident adults—under Sec. 2831 of the Code of 1860—the service may be so had upon the defendant minors, p. 426.

Reaffirmed in Williams v. Westcott, 77 Iowa 341, 14 Am. St. Rep. 287, 42 N. W. 317, under Sec. 2618 of the Code of 1873.

2. Resulting Trust in Land—Parol Evidence to Establish—Statute of Frauds—Tax Sale Purchaser Taking Deed under Agreement to Convey to Owner.—Where a tax sale purchaser before the expiration of the time for redemption agrees with the owner of the land that he (the tax sale purchaser) will take the deed thereto and reconvey to the land owner upon his paying such sum as is required to redeem from the sale, then upon his taking such deed he will be held to hold in trust for the land owner; and the latter may, upon tender-

ing such sum and demanding a deed and upon refusal by the tax sale purchaser to execute it, specifically enforce the agreement in equity. Such agreement is not within the Statute of Frauds, and may be proven by parol evidence, pp. 428, 429.

Reaffirmed and varied in Byers v. Johnson, 89 Iowa 283, 56 N. W. 451, holding that a land owner or one owning an interest in land (in this case the interest of a wife in homestead of her husband) sold for taxes may arrange with another to buy the tax sale certificate and hold it for such owner; and that upon the latter paying part of the purchase price of the certificate at the time of or after its purchase and assignment by and to the third person, he (the owner) will acquire such a right to the property as a court of equity will enforce.

Reaffirmed and varied in McElroy, Rec'r, v. Allfree, 131 Iowa 114-116, 117 Am. St. Rep. 412, 108 N. W. 118, holding that where one agrees with the owner of land sold for taxes, to buy the tax sale certificate, procure the tax deed and hold the title as security for a debt, the owner will be held to have a resulting trust therein, enforceable in equity; and that parol evidence is admissible to prove such facts.

Cited in McDowell v. McDowell, 141 Iowa 289, 119 N. W. 703, the case involving estoppel *in pais*.

Distinguished in Burden v. Sheridan, 36 Iowa 134, 136, 14 Am. Rep. 505, holding that where one man merely employs another by parol as an agent to purchase real property for him, and the person thus employed purchases the land in his own name, and no part of the purchase-money is paid by the principal, and the agent denies the trust, it would directly overturn the Statute of Frauds to admit any other evidence than that which the statute requires, and parol evidence is incompetent to prove a resulting trust in favor of the principal.

Cross reference. See further in this connection, annotations under *Sunderland v. Sunderland* (19 Iowa 325), Vol. II, p. 734.

MURPHY v. BRD. OF DIRECTORS OF INDEPENDENT DIST. OF MARENGO,
30 IOWA, 429

1. **Schools—Power of Board of Directors to Make Rules and Expel Pupils—Mandamus, When Lies in Behalf of Expelled Pupil.**—Under Section 2054 of the Code of 1860, and Chap. 172, Acts of 1862 (9th General Assembly), the board of directors has power to dismiss pupils from school for gross immorality, or for persistent violations of the rules and regulations of the school as passed for the control of the school by the board; but the laws mentioned do not authorize the board of directors to *suspend* pupils for acts tending to destroy the peace and harmony of the school, or inciting insubordination in others, or for ridicule of the directors, in the absence of any regulation prohibiting such acts.

Where the board of directors of a school district has expelled a pupil from school without legal authority, mandamus lies in behalf of the pupil to compel the board to permit him to attend, p. 432.

Reaffirmed in part in Brown v. Crego, 32 Iowa 501, the court holding that mandamus lies to compel county officers to perform their imperative official duties.

Reaffirmed, explained and qualified in Kinzer by next friend v. Board of Directors of the Independent School District of Marion, 129 Iowa 444-447, 6 Am. & Eng. Ann. Cas., 996, 3 L. R. A. (New Series) 496, 105 N. W. 687, holding that under Secs. 2772 and 2782 of the Code of 1897, the board of directors of a school district may expel any scholar from school for immorality or for violation of the regulations or rules established by the board, or when the presence of the scholar is detrimental to the best interests of the school: That the question of whether or not the rule adopted by the board, the enforcement of which is complained of, is reasonably within the scope of the power thus conferred, is subject to inquiry in the courts, and the party complaining is not limited to an appeal to the county superintendent; but that a rule may be so far unreasonable or beyond the exercise of discretion that the courts will say that the board acted without authority in making and enforcing it: And holding that such board has power to prohibit the pupils of a high school from playing football in a game purporting to be played under the auspices of the school or on a team purporting to be a team representing the school, and to suspend a pupil for violation thereof.

HACKWORTH, GUARDIAN v. ZOLLARS, 30 IOWA 433

1. Appeal in Equity Case—Assignment of Errors, When Not Necessary.—Upon appeal in an equity case tried below by the first method prescribed by Secs. 2999 and 3000 of the Code of 1860, no assignment of errors is necessary; as the case will be tried *de novo* upon the appeal, p. 436.

Reaffirmed and explained in Walker v. Plummer, 41 Iowa 698, (abstract), holding that, under the Code of 1873, upon an appeal in an equity case tried below on written evidence, the original written evidence must be certified as part of the record upon appeal, whereupon the case will be there tried *de novo*, without any motion for new trial or exceptions in the court below, or assignment of errors.

Distinguished in Finch v. Hollinger, 47 Iowa 175, holding that under Sec. 2741 of the Code of 1873, all cases are tried in the district court, or the circuit court upon oral evidence; and that before a party may have a trial *de novo* upon appeal to the Supreme Court in an equity case, he must have moved for and obtained a trial upon written evidence in the court below.

2. Res Adjudicata—Failure to Interpose Defense.—A defendant cannot litigate in a subsequent action, matters which he could have interposed as defense to a former action against him brought by the party whom he later sues. In such case the judgment on the merits in the first case binds parties and privies, and concludes the defendant as to all matters which he either did or could have interposed as defenses thereto, pp. 436, 437.

Reaffirmed in Smith, Cleary & Enright v. Leddy, 50 Iowa 115; Mally v. Mally, 52 Iowa 659, 3 N. W. 674; Ebersole v. Lattimer & Inglis, 65 Iowa 165, 166, 21 N. W. 501; Wolfinger, Adm'r, v. Betz, 66 Iowa 596, 24 N. W. 230; Foster v. Hinson, 76 Iowa 720, 39 N. W. 685; Smith v. Baldwin, 85 Iowa 575, 52 N. W. 496; Murphy v. Cudihy, 111 Iowa 646, 82 N. W. 1000.

Reaffirmed, explained and qualified in Lawrence Sav. Bank v. Stevens, 46 Iowa 432; Tredway v. McDonald, 51 Iowa 667, 2 N. W. 570, holding that in the absence of fraud or artifice on the part of his adversary a party defendant is estopped from relitigating what he might have successfully set up in the defense of a former action.

Reaffirmed and varied in Newby v. Caldwell, 54 Iowa 104, 6 N. W. 155, holding that a plaintiff cannot sue *ex contractu* on a set of facts, and, after judgment against him, sue again *ex delicto* on the same set of facts.

Reaffirmed and varied in School District Township of Franklin v. Wiggins, 142 Iowa 383, 384, 120 N. W. 1035, holding that a plaintiff cannot later sue on matters which were evidently adversely adjudged against him in a decree in a former action which was brought by him.

Cross References. See further on this question, annotations under Rule 2 of Dalton v. Lane & Guye (13 Iowa 538), Vol. II, p. 183; and see, also, in this connection, annotations under Whitaker v. Johnson County (12 Iowa 595), Vol. II, p. 102.

3. Judicial and Execution Sales of Land—Uncertain Description in Sheriff's Deed—When Will Not Be Set Aside as Void.—A sheriff's deed to land sold at execution or judicial sale will not be set aside as void for uncertainty of the description therein in an action in equity to quiet title by those claiming adversely thereto, if it is shown that the identical land attempted to be described was actually sold by the sheriff under the execution, p. 438.

Reaffirmed in McCormick v. McCormick Harvesting Co., 120 Iowa 597, 95 N. W. 183.

TODD v. BRANNER, 30 IOWA 439

1. Appeal—Assignment of Errors—Certainty Required.—Under Sec. 3059 of the Code of 1860, an assignment of errors must not be general, but must, as specifically as the case will permit, point out each error relied on to reverse the judgment.

So whether or not there was error in the giving or refusing instructions will not be considered on appeal, when not excepted to below, and the assignment of errors does not point them out, p. 441.

Reaffirmed in Wood v. Whitton, 66 Iowa 300, 301, 19 N. W. 907.

Cross Reference. See further on this question, annotations under Hawes v. Twogood (12 Iowa 582), Vol. II, p. 100.

ALSBERG, JOURDAN & Co. v. LATTI, 30 IOWA 442

1. Sales of Personal Property—Delivery to Carrier for Transportation to Buyer—When Operates as Constructive Delivery to Latter—Right of Latter to Inspect and Reject—Rights of Attachment Creditors of Buyer.—Where goods are given to a common carrier for transportation to their buyer, and they are not the goods ordered by the buyer, and the terms of payment sent by the seller to the buyer with the invoice are different from those agreed on, the delivery to the carrier does not operate as constructive delivery to the buyer and the title does not thereby vest in him, but he has a right to reject the goods. When he does so reject or refuse to accept them, his subsequent attachment creditor cannot levy on them as belonging to him, pp. 446, 447.

Cited in Baker v. Johnson County, 37 Iowa 189, the court holding that an offer by one party assented to by the other will generally constitute a contract, but the assent must comprehend the whole of the proposition; and that a proposal to accept, or an acceptance of, an offer on terms varying from those proposed, amounts to a rejection of the offer.

Cited in Billmeyer v. Queen Mfg. Co., 150 Iowa 322, the court holding that until there has been an acceptance, the right to rescind on the ground that the seller had fraudulently misrepresented the quality and condition of the thing sold is not lost although there has been a delivery to the common carrier which in itself is sufficient to pass title.

Distinguished in Leggett & Meyer Co. v. Collier, 89 Iowa 147, 148, 56 N. W. 418, holding that where goods are ordered from a merchant, who acts on the order by delivery to a carrier to be shipped to the buyer, the title thereto thereupon vests in the latter, subject to the seller's right of stoppage *in transitu* before they are actually delivered to the buyer.

Unreported citation, 130 N. W. 117; 134 N. W. 564.

2. Sales of Personal Property—Delivery to Carrier by Seller—Right of Stoppage in Transitu—Rights of Creditors of Buyer.—Where goods purchased are delivered to a common carrier for transportation and delivery to the buyer, the right of stoppage *in transitu* exists in favor of the seller until an actual delivery to the buyer; and

until such time the seller may exercise such right to the exclusion of the rights of attachment creditors of the buyer, pp. 447, 448.

Reaffirmed and explained in *McFetridge, Burchard & Co. v. Piper*, 40 Iowa 628; *Greve & Co. v. Dunham, sheriff*, 60 Iowa 111, 14 N. W. 131; *Warner v. Johnson & Hakeman*, 65 Iowa 128, 129, 21 N. W. 484, holding that the right to stoppage *in transitu* exists in favor of the seller of goods until arrival at their destination and the delivery of actual or constructive possession to the buyer by the carrier.

Reaffirmed and explained in *Legett & Meyer Co. v. Collier*, 89 Iowa 147, 148, 59 N. W. 418, holding that where goods are ordered from a merchant, who acts on the order by delivery to a carrier to be shipped to the buyer, the title thereto thereupon vests in the latter, subject to the seller's right of stoppage *in transitu* before they are actually delivered to the buyer.

(Note.—There are other cases sustaining the text, and its annotations, but not citing the text.—Ed.)

STANNUS v. STANNUS, 30 IOWA 448

1. Negotiable Note—Transfer of After Maturity—Defenses—Set-Off.—Where a negotiable note is transferred after maturity, the indorsee takes it subject to all defenses by way of counterclaim or otherwise that the maker has against the payee, which attach to the particular note, and would control, qualify or extinguish it, but not subject to set-offs of the maker against the payee arising from independent transactions, p. 451.

Special cross reference. For cases citing the text, and many others on this question, see annotations under *Younger v. Martin* (18 Iowa 143), Vol. II, p. 598.

COOK v. JENKINS & Co., 30 IOWA 452

1. Execution Sale of Land—Excessive Levy and Sale Under—Setting Aside in Equity.—Under Sec. 3268 of the Code of 1860, it is the duty of the sheriff to levy upon property in such quantities as will be likely to realize the exact amount of the execution and costs; and when he fails to so do, a sale of land under an excessive levy will be set aside as against the execution plaintiff, and a purchaser with knowledge thereof, and except where rights of innocent third persons intervene, in an action in equity by the execution defendant (debtor and land owner).

So where land of the value of \$800 is levied upon and sold under execution for a \$21 judgment and \$20 costs, and the land is appraised at \$800 by the appraisers and sells at the execution sale for \$535, and the attorney or agent of the execution plaintiff becomes purchaser, the sale will be set aside in an action in equity by the execution debtor (land owner), p. 454.

Reaffirmed as to first paragraph in Fortin v. Sedgwick, 133 Iowa 236-240, 12 Am. & Eng. Ann. Cas. 337, 110 N. W. 462, 463; *Cooper v. Iowa Trust & Sav. Bank*, 149 Iowa 342-344, under Sec. 3970 of the Code of 1897, corresponding to the section of the text.

Distinguished and narrowed in Jonas v. Weires, Craig & Ray, 134 Iowa 55-57, 111 N. W. 456, holding that the rule of the text, and Sec. 3970 of the Code of 1897, corresponding to the section of the text, are inapplicable where an *undivided* interest of the execution debtor is levied on and sold thereunder.

McKIVITT v. CONE, 30 IOWA 455

1. Trial—Practice—Evidence—Account Book to Refresh Memory—When and When Not to be Produced in Court—Cross Examination, etc.—Where a witness uses an account book to refresh his memory, and the book is in court, the adverse counsel is entitled to examine the book and to cross examine the witness in reference to the items therein.

Where a witness remembers having seen a writing before and remembers that, at the time he saw it, he knew the contents to be correct, though he has, at the time it is produced, no independent recollection of the facts mentioned in it, the writing itself *must be* produced in court in order that the other party may cross examine, pp. 458, 459.

Cited in Brodhead v. Wiltse, 35 Iowa 431, the court holding that a physician or surgeon may testify as to what scientific authorities in medicine treat as to a particular branch or subject of medicine or surgery without the books being produced in court, or his referring to them.

Cited in Adae & Co. v. Zangs, 41 Iowa 539, not in point.

2. Landlord and Tenant—Evidence to Prove Stipulations in Lease—Other Contracts by Landlord or His Rule as to, Incompetent.—In an action between a landlord and tenant involving particular stipulations in the lease, evidence in favor of the tenant, that the landlord entered into other leasing contracts the same year with others, containing the same stipulations, and that it was the landlord's rule to have the particular stipulation in all his leases, is incompetent, p. 458.

Cited in Kinney v. McFaul and Lewis, 122 Iowa 454, 98 N. W. 277, the court holding that in an action involving whether or not a party borrowed certain money without a written evidence thereof, evidence in his favor that he was methodical and accurate in his business habits, and that he usually evidenced all his business transactions by writing, is incompetent.

AYLESWORTH v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co., 30
IOWA 459

1. Railroads—Liability for Killing or Injuring Stock—Duty to Fence and Keep Fence in Repair.—It is the duty of railroad companies (under Chap. 69, Acts of 1862) to fence their roads, and if they fail to do so they are absolutely liable for stock injured, in the absence of the willful act of the owner. It is also their duty to maintain and keep up the fences after they are made; and for a failure to do this they will be likewise liable. But before that liability will attach in the latter case, in the absence of wrong on their part, they must have knowledge that the fence is out of repair, and a reasonable time thereafter to put it in repair. After the company has knowledge that the fence is down, which knowledge may be shown by direct proof or by the lapse of such time as would afford a reasonable presumption of it, they must use proper diligence in putting it up, and for neglect in this regard, will be liable, as for omitting to build a fence, p. 461.

Reaffirmed in Dewey v. Ch. & N. W. R. R. Co., 31 Iowa 376; Hilliard v. C. & N. W. Ry. Co., 37 Iowa 445, 446; Davis v. C. R. I. & P. R. R. Co., 40 Iowa 294; McCormick v. C. R. I. & P. R. R. Co., 41 Iowa 195; Henderson v. C. R. I. & P. R. R. Co., 48 Iowa 221; Brentner v. C. M. & St. P. R. R. Co., 58 Iowa 628, 12 N. W. 616; Bennett v. Wabash, St. L. & Pac. Ry. Co., 61 Iowa 356, 16 N. W. 211; Daily v. Ch. M. & St. P. Ry. Co., 121 Iowa 256, 96 N. W. 778; Wirstlin v. Ch. M. & St. P. Ry. Co., 124 Iowa 176, 99 N. W. 699, the decisions being under the laws of the text, and Sec. 1289 of the Code of 1873 and Sec. 2055 of the Code of 1897, corresponding thereto.

Reaffirmed and explained in Lemmon v. Ch. & N. W. R. R. Co., 32 Iowa 152, holding that after a railroad company has fenced its road on both sides thereof, at all points where it has a right to fence, with a good and lawful fence, then it is required to use only ordinary and reasonable care and diligence to maintain and keep the same in repair; that is, such care as a reasonable and ordinarily prudent man should use in keeping his own fences in repair under similar circumstances.

Reaffirmed and explained in Perry v. Dubuque S. W. Ry. Co., 36 Iowa 105, holding that proof of the mere facts that bars in a railroad fence have been left down by some third person, and that through them cattle have strayed upon the track and been injured, does not make for the plaintiff a *prima facie* case; that he must go further and show that the defendant was guilty of negligence in permitting them to remain down.

Reaffirmed and explained in Henderson v. C. R. I. & P. R. R. Co., 39 Iowa 223, holding that where gates or bars are provided by a railroad company at a private crossing, it is required to use only reasonable care and diligence to keep them closed or up, and if, notwithstanding this, a gate is left open or bars down, and injury to stock

results, the loss must be borne by the party whose negligence occasioned it.

Reaffirmed and explained in Wait v. B. C. R. & N. Ry. Co., 74 Iowa 209, 37 N. W. 159, holding that in an action for killing livestock which was killed by reason of a gate on the right of way being left open, what constitutes the proper exercise of care, and whether a failure to inspect the gate for three or four days, or for a longer or shorter time, is negligence, or whether the gate's being open for thirty-six hours will raise a presumption of negligence against defendant, and charge it with the knowledge that the gate was open, are matters for the determination of the jury: That in such a case it is the duty of the railroad company to close the gate after gaining knowledge thereof, by whomsoever it may have been left open.

Cited in Farley v. C. R. I. & P. R. R. Co., 42 Iowa 237, holding that it is the duty of railroad companies to erect and keep in repair and in safe condition, all highway and other crossings the statute requires them to construct—failing which they will be liable for personal injuries thereby occasioned.

Cited in Small v. C. R. I. & P. R. R. Co., 50 Iowa 341 (cited in dissenting opinion 359), the court holding that under Sec. 1289 of the Code of 1873, proof of destruction of property by fire set by sparks from an engine makes a *prima facie* case of negligence, and shifts the burden of proof to the defendant (railroad company) to disprove its negligence or to prove contributory negligence on the part of the plaintiff.

Cited in Case v. Ch. R. I. & P. Ry. Co., 64 Iowa 763, 21 N. W. 30 not in point, but involving negligence under a different state of facts.

Cited in Weirs v. Jones County, 80 Iowa 355, 45 N. W. 884, not in point.

Distinguished in Ford v. C. R. I. & P. Ry. Co., 91 Iowa 184, 24 L. R. A. 657, 59 N. W. 7, the court holding that in an action to recover damages for the death of a person caused by a railroad train, where the administrator claims the right to recover by reason of the neglect or refusal of the railroad company to provide sufficient and safe crossings and cattle guards at a public highway crossing as provided by Sec. 1288 of the Code of 1873, the plaintiff, in order to recover, need only establish the neglect or refusal of the company to comply with the statute and that the death resulted therefrom; but that such section does not preclude the defendant from showing contributory, or even independent negligence on the part of the intestate, or any other defense it may have.

Cross References. See further on this question, annotations and cross references under Spence v. Ch. & N. W. Ry. Co., (25 Iowa 139), ante. p. 247.

BERRY v. FURHMAN, 30 IOWA 462

1. Limitation of Actions—Actions by Widow to Recover Dower and to Set Aside Release of without Her Authority, When Barred.—An action by a widow to recover dower or to set aside a release thereof made by an attorney without her authority and which she never ratified, is not barred—under the Code of 1860—till ten years after the party in possession of the land claims title adverse to or denies her dower right, p. 464.

Special Cross Reference. For cases citing the text, and others on this question, see annotations under Rule 2, of Sully v. Nebergall (30 Iowa 339), ante. p. 603; and see cross references there found.

RICHART v. RICHART, 30 IOWA 465

1. Wills—Bequest or Devise in Lieu of Dower—Election of Widow—Agreement between Widow and Devisee and Legatee to Take under Will—When Not Binding on Her.—Where a widow agrees with the residuary devisees and legatees of her deceased husband that she will take a bequest or devise under his will which, by the terms of the will, is in lieu of dower, and not to renounce the will and take her dower interest in testator's lands, provided the legatees or devisees will give her one-third of the personal estate, the agreement is not binding on the widow and she may disregard it, relinquish her rights under the will and take dower, if the other parties fail to comply with the terms of the agreement as to giving her such part of the personalty, pp. 468, 469.

Distinguished in Baldwin v. Hill, 97 Iowa 591, 592, 66 N. W. 890, holding that where a widow agrees with the executor and residuary legatee of her deceased husband to renounce and relinquish her dower interest in all of the testator's (husband's) real estate upon the payment of a certain sum to her, the payment thereof divests her of all dower or other interest therein without the execution of conveyances by her.

COOLEY, ADM'R, v. BROWN, 30 IOWA 470

(Later Appeal 35 Iowa 475.)

1. Fraudulent and Voluntary Conveyances—Action to Recover Property or Its Value by Administrator of Grantor—Subsequent Purchaser with Knowledge of Facts, Rights of.—The administrator of a decedent grantor may maintain an action at law to recover property or its value fraudulently or voluntarily conveyed or transferred by his decedent before his death. In such case the administrator acts on behalf of and for the benefit of the creditors of the decedent. A purchaser of the property from the fraudulent grantee who takes with full knowledge of the facts, has no better rights than him from whom he takes, pp. 472, 473.

Reaffirmed and explained in Doe v. Clark & Haddock, 42 Iowa 123, 124, holding that an administrator may maintain an action for the recovery of rents collected by the assignee of a lease, where the assignment was fraudulently executed by the administrator's decedent.

Reaffirmed and explained in Hansen's Empire Fur Factory v. Long, Adm'r, 104 Iowa 370, 371, 73 N. W. 878, holding that where an administrator brings an action in equity to set aside a conveyance of his decedent as fraudulent, and is denied the relief therein, he represents all the creditors of his decedent whose debts the property would be subject to the satisfaction of; and the decree therein binds all such creditors.

Reaffirmed and extended in Stewart, Adm'r, v. Phenice, 65 Iowa 478-480, 22 N. W. 637, holding further that upon the resignation or removal of an executor or administrator his successor may recover of the predecessor and the sureties on his bond, assets of the estate in his hands not accounted for, paid out, or distributed to heirs or creditors; that in such case the successor is liable to the legatees or distributees and must, himself, look to the predecessor and his sureties therefor.

Reaffirmed and extended in Mallow v. Walker, 115 Iowa 246, 91 Am. St. Rep. 158, 88 N. W. 455; Blackman v. Baxter, Reed & Co., 125 Iowa 120-122, 70 L. R. A. 250, 2 Am. & Eng. Ann. Cas., 707, 100 N. W. 76, holding further that the administrator of an estate may maintain an action to set aside a conveyance of his decedent, if in fraud of decedent's creditors.

Reaffirmed and varied in Crary, Trustee in Bankruptcy v. Kurtz, 132 Iowa 111-113, 119 Am. St. Rep. 549, 105 N. W. 592, holding that a trustee in bankruptcy may, when necessary to pay debts of a bankrupt, bring suit to set aside fraudulent conveyances of the bankrupt to land without reducing the claims to be paid, to judgment.

Reaffirmed and varied in In re estate of Acken, 144 Iowa 527, 532-535, 1912 A., Am. & Eng. Ann. Cas., 1166, 123 N. W. 192, holding that a person may be examined under oath, under Sec. 3315 of the Code of 1897, upon motion of an administrator for the purpose of obtaining possession by him of personal property belonging to his decedent although the proceeding involves the validity of a transfer thereof by decedent or by an attorney of decedent made by the latter to himself, and although there be no debts of the decedent.

Cited with approval in Hay v. Cowgill, 52 Iowa 712 (abstract), 2 N. W. 400, being an action in equity by an administrator to set aside a conveyance of his decedent as void—the case, however, turning upon other points.

Unreported citation, 110 N. W. 28.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

PACKARD v ILLINOIS CENT. R. R. Co., 30 IOWA 474

1. Railroads—Liability for Injury to or Killing Stock.—If stock is killed or injured by a railroad company where it has a right to but does not fence, it is liable absolutely, under Chap. 169, Acts of 1862: If there be a fence, gross negligence on the part of the company must be shown in order to fix any liability: But if the injury or killing occurs where there is no right of the company to fence, the company is held to reasonable care, and is liable for ordinary negligence.

But Chap. 169, Acts of 1862, does not apply to or give a railroad company a right to fence, or fix such absolute liability for its failure to fence, depot grounds, or its right of way to its road or switches in cities or towns, or along streets and alleys thereof, p. 475.

Reaffirmed and explained in Schneir v. C. R. I. & P. R. R. Co., 40 Iowa 338, applying the rule to an action for killing stock at a highway crossing, and holding that the law of the text does not give a railroad company a right to fence at such place.

Cross Reference. See further on this question, annotations under Davis v. B. & M. Riv. R. R. Co. (26 Iowa 549), ante. 361.

POWERS v. FULLER, 30 IOWA 476

1. Tax Sales of Land—Tax Deed—Power of Legislature to Make Conclusive Evidence of Facts—Tax Deed Prima Facie Evidence of Essential Steps Necessary to Validity of Sale.—The assessment of real estate is one of the essential pre-requisites to the exercise of the taxing power, and without which the right to sell could not arise; and hence it is not competent for the legislature to make the deed conclusive evidence of that fact.

The deed is only *prima facie* evidence of the existence of the essential steps, while it is *conclusive* evidence of the non-essential or directory steps, p. 477.

Special Cross Reference. For cases citing and sustaining the text, and many others on this question, see annotations under Rule 2 of McCready v. Sexton & Son (29 Iowa 356), ante. p. 539.

BUSH v. YEOMAN, 30 IOWA 479

1. Costs—Judgment for Against Successful Party—Appeal—Affirmance, When.—While it is true as a rule that the successful party is entitled to recover his costs, this is not universally true, the court having the power under peculiar circumstances to adjudge otherwise. And where on appeal it is sought to reverse a judgment for costs against the successful party, the record must disclose the facts upon which the trial court acted, and his abuse of discretion, or that the lower court had no right or discretion—under the Code of 1860—to enter such a judgment, or it will be affirmed, p. 480.

Reaffirmed in Boone County v. Wilson, 41 Iowa 70; *Harvey v. Pinkerton & Wilson*, 101 Iowa 249, 70 N. W. 192, under the Code of 1873.

(Note.—There are other cases under the various codes, sustaining, but not citing the text.—Ed.)

HAMILTON *v.* WRIGHT, 30 IOWA 480

1. Adverse Possession—What Constitutes—Color or Claim of Title—How Proved.—In order to constitute adverse possession of land the party relying thereon must have held under *color of title* or under *claim of title*. To constitute the former, he must have a paper title, while the latter may be proven wholly by parol evidence, p. 486.

Reaffirmed in Schmidt v. Zahensdorf, 30 Iowa 499; *Colvin v. McCune*, 39 Iowa 504, 505; *Tracy v. Newton*, 57 Iowa 211, 212, 10 N. W. 637; *Montgomery County v. Severson*, 64 Iowa 328, 329, 20 N. W. 458; *Sater v. Meadows*, 68 Iowa 509, 27 N. W. 482; *O'Reagan v. Duggan*, 117 Iowa 616, 91 N. W. 910; *Hughes v. Wyatt*, 146 Iowa 396, 125 N. W. 335.

Reaffirmed and explained in Grube v. Wells, 34 Iowa 149-152, holding that in order to constitute adverse possession of land such as will bar the true owner from its recovery, the possession must be under color or claim of title, and must be open, notorious, adverse and hostile to the rights of the former; and must be continued for the statutory period of ten years.

Reaffirmed and explained in Tremaine v. Weatherby, 58 Iowa 620, 12 N. W. 612, holding that to constitute color of title, it is not requisite that the title under which the party claims should be a valid one, and its want of validity may result from its original inherent defects.

Reaffirmed and explained in Montgomery County v. Severson, 64 Iowa 331, 20 N. W. 459, holding that where one holds and has possession of land for the statutory period of ten years, under an equitable title, it is sufficient on which to base a claim of adverse possession or a bar under the statute of limitation.

Reaffirmed and explained in Wickham v. Henthorn, 91 Iowa 244, 245, 59 N. W. 277, holding that an entry on land without color of title or claim of right may become adverse by subsequently acquiring color of title or claim of right, and holding it; but the possession is only adverse from the time of acquiring such title or claim of right.

Reaffirmed and explained in Shelly v. Smith, 97 Iowa 264, 265, 66 N. W. 174, holding that adverse possession may be based on a color of title or on a claim of right as against the grantee of the general government, even though the land be not formally conveyed by it.

Reaffirmed and extended in Knudson v. Litchfield, 87 Iowa 120, 54 N. W. 201, holding that possession of land by tenant is sufficient to constitute adverse possession.

Reaffirmed and extended in Libbey v. Young, 103 Iowa 260, 261, 72 N. W. 521, holding further that where one holds possession of a part of a subdivision of land under color of title or claim of right, such possession, color or claim will be presumed to extend to the entire subdivision, until this presumption is overcome by proof.

Cited in Lunquest v. Ten Eyck, 40 Iowa 215, the court holding that in order for one to claim for improvements on land, he must (under Secs. 2264-2269 of the Code of 1873) hold possession under color of title and make the improvements thereon in good faith: That one holds land under "color of title" (under the sections above) when he has a paper title, or holds as a good faith purchaser under a judicial or tax sale, or when he has held possession of land by himself or his tenants, or by those through whom he claims for a period of five years.

Cited in Lindt v. Uihlein, 116 Iowa 52, 89 N. W. 215, the court holding that by "color of title" is meant that which appears to be but is in fact no title; that a deed which is void for want of title in the grantor, or for any irregularity in its execution or acknowledgment, or for any other cause not chargeable to the wrong or fraud of the grantee, is sufficient to constitute color of title; but that to constitute color of title for the purpose of asserting any right thereunder against the true owner, the deed or paper upon which it is sought to be based must have been obtained in good faith.

Cross References. See Rule 2 hereof. See further on this question, annotations under Rule 2 of Close v. Sam (27 Iowa 503), ante. p. 428, and cross references there found.

2. Adverse Possession—Entry on Land without Color of Title or Claim of Right—Subsequent Acquired Color of Title or Claim of Right.—An entry on land without color of title or claim of right may become adverse by subsequently acquiring color of title or claim of right, and holding under it; but the possession is only adverse from the time of acquiring such title or claim of right, pp. 487, 488.

Reaffirmed in Wickham v. Henthorn, 91 Iowa 244, 245, 59 N. W. 277.

Cross Reference. See other rules hereof in this connection.

3. Adverse Possession—Descent or Devise—Possession of Ancestor—Color of Title of Heirs or Devisees.—Possession of land by heirs or devisees by descent or devise from one dying in possession gives them color of title, even though the one under or through whom they claim and hold may have been a trespasser and without color of title or claim of right therein or thereto p. 489.

Reaffirmed in Teabout v. Daniels, 38 Iowa 159-161; Sires v. Melvin, 135 Iowa 467, 468, 113 N. W. 109.

Unreported citation, 79 N. W. 271.

HALLOWELL & COBURN v. FAWCETT, 30 IOWA 491

1. Trial—Opening and Closing Arguments—Judicial Discretion of the Trial Court—Abuse of—Reversal.—The trial court has a sound judicial discretion vested in him in the matter of awarding the opening and closing arguments to the jury; and his ruling on such question will not be ground for reversal, except in case of abuse of such discretion and prejudice resulting to the substantial rights of the party appealing and complaining, p. 493.

Special Cross Reference. For cases citing and sustaining the text, and many others on this question, see annotations under Rule 1 of *Viele v. Germania Ins. Co.* (26 Iowa 9), ante. p. 298; and see cross references there found.

2. Bailment—Principal and Agent—Factors—Commission Merchant—Sale of Property Consigned for Advances—Demand on Consignee.—A factor or commission merchant cannot sell property consigned to him to reimburse him for advances made thereon, until the consignee, upon proper demand, has refused and neglected to pay the advances due, p. 494.

Reaffirmed, explained and qualified in *Walker v. Dubuque Fruit Co.*, 113 Iowa 432, 433, 53 L. R. A. 775, 85 N. W. 616, holding that wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof according to his own pleasure, from time to time, if no advance has been made or liability incurred on account thereof; and the factor is bound to obey his orders; but that if the factor makes advances or incurs liability on account of the consignment, by which he acquires a special property therein, then the factor has the right to sell so much of the consignment as may be necessary to reimburse advances or meet liabilities, unless there is some existing agreement between himself and the consignor which controls or varies this right.

SCHMIDT v. ZAHENSDORF, 30 IOWA 498

1. Res Adjudicata—Defenses Set up But Not Adjudicated in Former Action.—*Res adjudicata* applies to defenses set up in an action which are not withdrawn, although the judgment recites that no evidence was introduced as to them and that they were not decided upon, p. 500.

Reaffirmed in *Gunsaulis v. Cadwallader*, 48 Iowa 51; *Hogle v. Smith*, 136 Iowa 36-38, 113 N. W. 557, 558.

Reaffirmed and explained in *Stodghill v. C. B. & Q. R. R. Co.*, 53 Iowa 345, 346, 5 N. W. 498, holding that an adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with the subject-matter of litigation.

Distinguished in Eckert & Williams v. Pickel, 59 Iowa 548-550, 13 N. W. 710, holding that a judgment against the holder of a promissory note in favor of the maker, because it was materially altered after execution and delivery and without the maker's knowledge or consent, does not bar another action by the holder against the maker for the consideration of the note.

JORDAN v. SMITH, 30 IOWA 500

1. Mortgage Lien—When Extinguished—Judgment against Principal and Surety on Note—Effect.—A mortgage lien is not extinguished until the debt it is given to secure is satisfied, no matter how the evidence of the debt be changed and even if it be merged in a judgment.

So a judgment against the principal and surety on a promissory note secured by mortgage, does not extinguish the mortgage lien or prevent a subsequent action for its foreclosure, pp. 501, 502.

Reaffirmed in Port v. Robbins, 35 Iowa 209, 210.

(Note.—There are many other cases sustaining but not citing the text.—Ed.)

STATE v. HOCKENBERRY, 30 IOWA 504

1. Criminal Law—Sufficiency of Indictment—Clearness and Certainty Required—Larceny of Bank Notes.—Under Sec. 4659 of the Code of 1860, an indictment is sufficiently clear and definite if it describes the offense or crime in such a manner as to enable a man of common understanding to know what is intended and the court to pronounce judgment in case of conviction.

So an indictment for larceny charging accused with stealing "\$180 in bank notes, usually known and described as greenbacks," is sufficiently definite as to the money stolen, pp. 505, 506.

Reaffirmed as to first paragraph in State v. Smith, 88 Iowa 2, 55 N. W. 17.

Reaffirmed and explained in State v. Fisher, 106 Iowa 663-666, 77 N. W. 459, holding that—under Sec. 5280 of the Code of 1897—an indictment charging accused with the larceny of "twenty-two dollars and fifty cents in lawful money of the United States, of the value of twenty-two dollars and fifty cents," is sufficient as to the description of the money stolen.

Cross references. See further on this question, annotations under Rule 1 of State v. Thompson (19 Iowa 299), Vol. II, p. 729.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

LONDEGAN v. HAMMER, 30 IOWA 508

1. Officers—Judicial Officers—Not Liable for Judicial Acts.—

A judicial officer, whether of a court of general or original jurisdiction or of an inferior court, is not liable in damages for judicial acts; unless, perhaps, where he acts willfully or corruptly; but this exception to the rule is not herein decided, and is doubted, p. 512.

Reaffirmed in McGrew v. Holmes, 145 Iowa 542, 543, 124 N. W. 196.

Reaffirmed and explained in Green v. Talbot, 36 Iowa 501, holding that where the mayor of a city has authority under an ordinance to inflict a fine for a violation thereof, but not to imprison accused therefor, but who, acting in good faith, without malice and through an error in construction of the ordinance, inflicts a fine and orders accused to be imprisoned therefor, he is not liable in damages in an action for false imprisonment.

Reaffirmed and extended in Jones v. Brown, 54 Iowa 80, 37 Am. Rep. 185, 6 N. W. 143, holding further that where a judicial officer has jurisdiction he cannot be held liable in a civil action for damages for a decision therein, although it be alleged by the plaintiff in the action for damages that he acted fraudulently and corruptly.—Holding therefore, that an arbitrator is not liable in damages for an award made by him, although it is alleged that it was made fraudulently and corruptly.

Cited with approval and discussed in Heath v. Halfhill, 106 Iowa 133, 76 N. W. 523, not in point, but on a parity.

Unreported citation. 132 N. W. 379.

Cross Reference. See further on this question, annotations and cross references under Wassen v. Mitchell (18 Iowa 153), Vol. II, p. 603.

2. Officers—De Facto Officers—Evidence of—Presumption from Official Acts.—Where it is shown that one has been acting in the capacity of a public officer, he will be presumed to have been duly appointed to the office until the contrary appears; and it is not material how the question arises, whether in a civil or criminal case, nor whether the officer is or is not a party to the record.

Reaffirmed in Burke v. Cutler, 78 Iowa 306, 43 N. W. 207; State v. Row, 81 Iowa 143, 46 N. W. 873.

WARNER v. DORAN, 30 IOWA 521

1. County Roads—Appeal from Decision of Board of Supervisors—Refusal of Board to Appoint Appraisers and Award Damages.—Under Sec. 267 of the Code of 1860, a land owner may appeal to the circuit court from the decision of the county board of supervisors in refusing to entertain his claim for damages on account of

land taken for the establishment of a county road and in refusing to appoint appraisers to assess such damages.

Upon such appeal the circuit court may remand the proceeding to the board of supervisors for proper proceedings granting the above rights to the land owner, pp. 522, 524.

Reaffirmed and extended in Vancleave v. Clark, 37 Iowa 185, 18 Am. Rep. 6, holding that a land owner whom the board of supervisors has refused to allow any damages upon a change in a county road, may appeal to the circuit court.

2. Certiorari—When Lies and What Corrected by.—*Certiorari* does not lie where there is an adequate remedy provided by law by appeal.

So on a proceeding to establish a county road, before the county board of supervisors, *Certiorari* may bring up for review only the question of the expediency or propriety of establishing it, and, also, the legality and regularity of proceedings therefor; but it cannot so bring up the question of the allowance of or the refusal to allow damages to the land owner, as appeal is given by statute on those questions, p. 522.

Reaffirmed and explained in Tiedt v. Carstensen et al., supervisors, 61 Iowa 335, 336, 16 N. W. 215, holding that *Certiorari* lies under Sec. 3216 of the Code of 1873, when an inferior court, board, or officer having judicial functions has exceeded his jurisdiction or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy at law; but that errors in the decisions of such court, etc., on questions of fact, cannot be reviewed by writ of *Certiorari*.

CITY OF MUSCATINE v. STERNEMAN, 30 IOWA 526, 6 AM. REP. 685

1. Written Instruments—United States Revenue Stamps Not Affixed—Admissibility in Evidence.—The act of congress of June 30, 1864 applies to written instruments requiring a stamp, regardless of an intent or no intent to evade the law; and such act applies to and governs the admissibility as evidence of such instruments having no stamp affixed, in state as well as federal courts, p. 528.

Overruled in Harvey v. Wieland, 115 Iowa 565, 88 N. W. 1078; *State v. Glucose Sugar Refining Co.*, 117 Iowa 530, 91 N. W. 796, holding that under the United States Stamp Act of June 13, 1898, an instrument requiring a stamp, but having none affixed, is admissible in evidence unless the stamp was not affixed to defraud the government: And holding, also, that—under such Act—the stamp may be affixed at any time before it is offered as evidence.

Cross Reference. See further annotations under *Hugus v. Strickler* (19 Iowa 413), Vol. II, p. 743.

SMITH v. BOARD OF SUPERVISORS, 30 IOWA 531

1. **Certiorari, When Lies—What Reviewed by—** Trial of—Action of County Board of Supervisors in Equalizing Assessments for Taxation.—Under Section 3487 of the Code of 1860, the writ of *Certiorari* is granted in all cases where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its jurisdiction, or is otherwise acting illegally, when, in the judgment of the court applied to for the writ, there is no other plain, speedy and adequate remedy; but *Certiorari* does not lie to review or correct decisions of such a court, board, or officer on a matter of fact, within jurisdiction and powers conferred.

When the writ is issued and returned, the trial must be had upon the record, and extraneous evidence is not receivable.

So *Certiorari* does not lie to review or correct the decisions of the county board of supervisors in equalizing or raising assessments for taxation under the powers conferred by Sec. 739 of the Code of 1860, pp. 533-536.

Reaffirmed in Ferguson & Son v. Board of Review of the Town of Roe, 119 Iowa 341, 342, 93 N. W. 353, holding that where an appeal from a taxing board is provided for, errors in their action, so far as they are acting within their jurisdiction, cannot be cured by *Certiorari*.

Reaffirmed and explained in Keck v. Board of Supervisors of Keokuk County, 37 Iowa 548-550, holding that a writ of *Certiorari* lies where a town assessor refuses to correct assessment books as ordered by the board of trustees, and delivers such books, uncorrected, to the county auditor.

Reaffirmed and explained in Polk County v. City of Des Moines, 70 Iowa 353, 30 N. W. 615, holding that if the inferior tribunal be clothed with authority to decide upon facts submitted to it, the decision is not illegal, whatever it may be, if the subject-matter and the parties are within its jurisdiction, and *Certiorari* does not lie in such a case.

Reaffirmed and explained as to first paragraph in Tiedt v. Carstensen et al., supervisors, 61 Iowa 335, 336, 16 N. W. 215, holding that *Certiorari* lies under Sec. 3216 of the Code of 1873, when an inferior court, board, or officer having judicial functions has exceeded his jurisdiction or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy at law; but that errors in the decisions of such court, etc., on questions of fact, cannot be reviewed by writ of *Certiorari*.

Reaffirmed and explained as to first and second paragraphs in Jordan v. Hayne, 36 Iowa 15, 16, holding that the question of whether or not the action of township trustees, on a matter of a judicial or quasi-judicial character, was illegal and they were without jurisdiction,

may be tested by *Certiorari*: But that *Certiorari* must be tried upon the *record* and not upon *facts*.

Reaffirmed and explained as to first and second paragraphs in Iowa Medical College Ass'n v. Schrader et al., Board of Medical Examiners, 87 Iowa 660, 661, 20 L. R. A. 355, 55 N. W. 25, holding—under Sec. 3216 of the Code of 1873, in reference to *Certiorari*—that when a board is given a discretion by statute, courts cannot, on *Certiorari*, inquire into the correctness of its decisions upon matters of fact, nor review in such manner the exercise of the discretion conferred, even though the board in so acting were actuated by wrongful motives.

Reaffirmed and narrowed in Royce v. Jenney, 50 Iowa 679, holding that where a county board of equalization exercises powers in reference to taxation and not within its jurisdiction, the remedy of the party thereby aggrieved is by *Certiorari*.

Cited in Grimes v. City of Burlington, 74 Iowa 125, 37 N. W. 106; First Nat'l Bank of Estherville v. City Council of Estherville, 136 Iowa 207, 112 N. W. 831, the cases involving the proceedings upon appeal from the decision of a board raising an assessment for taxation, and the evidence receivable upon the appeal, burden of proof thereon, etc.

Distinguished and narrowed in Remey v. Board of Equalization of Burlington, 80 Iowa 474-476, 45 N. W. 900, holding that where a board of equalization raises an assessment or assesses personal property of a resident of another state, such action is illegal and void, and may be reviewed and set aside by *Certiorari*: And that in such case the non-resident is not required to appeal from the action of the board; that an appeal in such case is not the proper remedy.

GRAY v. COAN, 30 IOWA 536

(Later Appeal 40 Iowa 327.)

1. Tax Deed to Land Failing to Convey Title or Recite Facts Correctly—Power of County Treasurer to Execute Second Deed.—Where a tax deed to land, under a valid tax sale, fails to convey the legal title to the tax sale purchaser, or fails to recite the facts correctly, the county treasurer may execute a second deed conveying the legal title, or correcting the recitals of the first, pp. 540, 541.

Reaffirmed and explained in Martin v. Cole, 38 Iowa 148, holding that where the first tax deed to land is sufficient, a second one subsequently executed is a nullity, and will not be considered.

Cross Reference. See further on this question, annotations under Rule 4 of McCready v. Sexton & Son (29 Iowa 356), ante. p. 539.

DEIMAN v. CITY OF FORT MADISON, 30 IOWA 542

1. Municipal Corporations—Taxation—Agricultural Lands, When Exempt from.—Lands within a city limits which are used exclusively for agricultural purposes and receive no benefits from the city, are not subject to city taxation, pp. 549, 550.

Reaffirmed in Durant v. Kauffman, 34 Iowa 195.

Reaffirmed, explained and qualified in Farwell v. Des Moines Brick Mfg. Co., 97 Iowa 295, 35 L. R. A. 63, 66 N. W. 179, holding that in order for land within a city boundary to be exempt from taxation for municipal purposes, it must be used in good faith for agricultural purposes: Holding further that a taxation or assessments for pavements is not "taxation for city purposes" within the meaning of the exemption.

Cited in Lewis v. Eshleman, 57 Iowa 635, 11 N. W. 618, turning on another point.

Cross References. See further on this question, annotations and cross references under Rule 1 of Buell v. Ball, marshal (20 Iowa 282), Vol. II, p. 817.

SOWARD v. CHICAGO & NORTHWESTERN R. R. Co., 30 IOWA 551

(Later appeal 33 Iowa 386.)

1. Railroads—Liability for Killing or Injuring Stock—Right to Fence—Highway Crossing.—Under Chap. 169, Acts of 1862 (9th General Assembly), a railroad company is liable absolutely for killing or injuring stock at a place where it has a right to but does not fence; but this statute has no application to an action for stock killed at a highway crossing, as the railroad company has no right to fence at such place, pp. 552, 553.

Reaffirmed in Schneir v. C. R. I. & P. R. R. Co., 40 Iowa 338.

Cross Reference. See further on this question, annotations under Davis v. B. & M. Riv. R. R. Co. (26 Iowa 549), ante. p. 361.

QUINTON v. VAN TUYL, 30 IOWA 554

1. Fences—Trespass by Animals—Damages—Fence Viewers, Duties of Relating to—Secs. 1548 and 1551 of the Code of 1860, Construed.—Damages by reason of trespass on land by stock may be recovered by the land owner without the fence viewers appraising as provided by Sec. 1551 of the Code of 1860, such section only applying where the injured land owner distrains the stock for the damages; and Sec. 1548 of that Code allowing recovery for such damages without distraint. And where the damages are so claimed against the owner of the stock, ordinary evidence of the unlawfulness of the fence over or through which the stock entered the close, is admissible, p. 555.

Reaffirmed in Hilliard v. C. & N. W. Ry. Co., 37 Iowa 445.

2. Assault and Battery—Civil Action for—Evidence—Defendant's Reputation for Peace.—In an action for damages for assault and battery, evidence as to defendant's reputation for peace is inadmissible in justification, or to disprove malice, or in mitigation of punitive or exemplary damages, pp. 556, 557.

Reaffirmed in Reddin v. Gates, 52 Iowa 213, 2 N. W. 1082.

(Note.—See further specially on this question, Bays v. Herring, 51 Iowa 286.—Ed.)

3. Costs—Tender—Offer in Writing to Allow Judgment for Certain Sum—What Insufficient—Sec. 3405 of the Code of 1860, Construed.—In order in an action for money for the defendant to save costs and have them adjudged against the plaintiff, under Sec. 3405 of the Code of 1860, he must offer in writing to allow judgment to be rendered against him in the action for a certain sum. An offer in writing to pay plaintiff a certain sum *if he will dismiss his action*, is insufficient, pp. 557-559.

Reaffirmed in De Lang v. Wilson, 80 Iowa 217, 218, 45 N. W. 764, a case wherein the offer to allow judgment and notice in writing, under Sec. 2900 of the Code of 1873, was properly made.

FORNEY & THAYER v. RALLS & WILLITS, 30 IOWA 559

1. Actions and Special Proceedings—Rules of Procedure—Ad Quod Damnum Proceedings.—Under Sec. 4173 of the Code of 1860, the rules of proceedings prescribed for civil actions by ordinary proceedings in the district court shall be followed in all proceedings of a special character, whether before the district court or any other tribunal, so far as applicable and not otherwise regulated.

And this rule applies to a special proceeding of *ad quod damnum*, pp. 561, 562.

Reaffirmed in Burnham v. Thompson, 35 Iowa 425, 426.

Distinguished in Hartley v. K. & N. W. Ry. Co., 85 Iowa 460, 461, 52 N. W. 353, holding that under Sec. 2520 of the Code of 1873, the provisions of the Code concerning the prosecution of civil actions are to be followed in special proceedings not otherwise regulated, so far as applicable; but the provisions contemplated are those which relate to the settling of the issues, the place and manner of trial, and other matters of that character: And holding, however, that a land owner has a right to commence a proceeding for the assessment of a right of way of a railroad, taken possession of and used by the company without paying him therefor, or without condemning and paying therefor as required by law; and that Sec. 2529 of the Code of 1873, requiring actions to be commenced within five years on "unwritten contracts * * * and all other actions not provided for," does not apply to such a proceeding; nor does the general statute of limitation apply to such a proceeding.

STATE v. SUTHERLAND, 30 IOWA 570

1. Criminal Law—Seduction—Evidence—Want of Chastity of Prosecutrix.—Upon the trial of an indictment for seduction the law presumes that the prosecutrix is of chaste character; and when she is introduced as a witness by the State she may be cross examined as to her acts and conduct with other men, showing her unchastity, pp. 572, 573.

Reaffirmed, explained and narrowed in State v. Deitrick, 51 Iowa 468, 1 N. W. 733, holding that the cross examination of the prosecutrix as in the text, must relate to her unchaste acts and conduct *previous to the time* of the alleged seduction.

Cited in Bailey v. Bailey, 94 Iowa 602, 63 N. W. 342, the court holding that in action by a wife for alienating the affections of her husband, she cannot be cross examined as to the nature or extent of her husband's affections before the alleged alienation.

Distinguished in Brown v. Kingsley, 38 Iowa 222, holding that upon the trial of a civil action by an unmarried female for her seduction, she may refuse to answer questions propounded to her on cross examination which would, if answered, show that prior to her seduction she had had illicit intercourse with other men.

Unreported Citation. 78 N. W. 682.

RICHARDS, CRUMBAUGH & SHAW v. HAINES, 30 IOWA 574

1. Partnership—Levy upon Partner's Interest in Firm by Individual Creditor—Equitable Action by—Rights of Co-Partners and Partnership Creditors.—Where an individual creditor of a partner, levies upon the latter's interest in the firm to satisfy his debt, and after notice in writing by another partner, as provided in Chap. 125, Secs. 3287-3292 of the Code of 1860, the execution is returned, and thereafter the individual creditor proceeds by action in equity as thereby allowed, he has no rights or interest in the partnership property or funds out of which to satisfy his debt, until the co-partners are paid their shares and any money due them for advancements, and until all creditors of the partnership are paid, pp. 577, 578.

Cited in Switzer v. Smith & McGowan, 35 Iowa 271; Cox v. Russell, 44 Iowa 560, the court holding that partnership creditors are to be paid out of the partnership property and funds before individual creditors of partners.

Cited in Brown v. Allen, 35 Iowa 312, the court holding that a surviving partner may maintain an action for injury to the partnership property, without joining, as a party, the administrator of the deceased partner: That a surviving partner has a right to wind up the affairs of the partnership, and that the administrator and heirs of the deceased partner have no interest therein, until this is done.

2. Exemptions—Waiver of by Execution Debtor.—Where an execution debtor voluntarily surrenders exempt property to the sher-

iff under an execution, he thereby waives his right to thereafter claim it as exempt, p. 579.

Reaffirmed and extended in Angell v. Johnson, 51 Iowa 626, 33 Am. Rep. 152, 2 N. W. 435; Green v. Blunt, 59 Iowa 80, 12 N. W. 762, holding further that when a debtor fails to object to exempt property being levied on under execution or to call attention of the officer to such fact, when he knows the writ is about to be levied thereon, he cannot, after levy, claim the property as exempt.

Reaffirmed and varied in Grover v. Younie, 110 Iowa 447, 81 N. W. 685, holding that a debtor may mortgage exempt property to secure a debt: Holding further that where a debtor mortgages one of three teams of horses to secure a debt, the instrument is valid, although his wife does not concur in and sign it, as provided by Sec. 2906 of the Code of 1897; as such transaction is simply an agreement of the debtor not to claim the mortgaged property as the exempt team, and does not amount to a mortgage of exempt personal property.

Cross reference. See further in this connection, annotations under Curtis v. O'Brien and Sears (20 Iowa 376), Vol. II, p. 829.

BOWER & CO. v. STEWART, 30 IOWA 579

1. Estoppel in Pais—Tenant Representing Rent Due—When Estopped by.—When a tenant represents that a certain sum is due to his landlord as rent under lease, and a person relies upon the representations and takes an assignment of the lease, the tenant is thereafter estopped to deny the indebtedness under the lease, as against the assignee, pp. 580, 581.

Reaffirmed and extended in Blake v. Miller, 135 Iowa 10, 112 N. W. 162, holding further that when a party has an interest in property and stands by and allows another to act to his prejudice in relation thereto, without making his interest known to the latter, he is thereby estopped as against the latter from asserting such interest: That when a party remains silent when it is his duty to speak, he is estopped from thereafter speaking, as against one who relied upon his silence.

*STATE v. SANDERS, 30 IOWA 582

1. Adultery—Evidence—Proof of Marriage.—Upon the trial of a married man under an indictment for adultery, evidence of his prior admission or statement that he was married, and that he and

* Note.—The case Bush v. Workman, sheriff, 64 Iowa 207, 19 N. W. 911, cites this case, but involves the question of the prosecution for adultery being commenced by the injured consort as provided by Sec. 4347 of the Code of 1860, and Sec. 4008 of the Code of 1873, corresponding thereto, which question is not determined in this case.—Ed.

the woman upon whose complaint the prosecution was commenced lived together as man and wife, is sufficient proof of marriage, pp. 583, 584.

Reaffirmed and explained in State v. Rocker, 130 Iowa 244, 106 N. W. 647, holding that the law will presume a legal marriage in the absence of other evidence, where it is shown that the parties have held themselves out to the world as husband and wife and have lived and cohabited together as such.

Cited in State v. Schaunhurst, 34 Iowa 550, 551, the court holding that on the trial of an indictment for incest by accused having sexual intercourse with his sister, declarations and conduct of the defendant as to the fact of the relationship are admissible to prove it.

Cross Reference. See further on this question, annotations and cross reference under State v. Wilson (22 Iowa 364), ante. p. 42.

2. Criminal Law—Adultery—Consent of Female Not Necessary to Convict.—Upon the trial of a married man under an indictment for adultery, proof of sexual intercourse by him, either with or against the will of the female is sufficient to authorize a conviction, p. 584.

Reaffirmed in State v. Donovan, 61 Iowa 279, 16 N. W. 130.

Reaffirmed and extended in State v. Clemenson, 123 Iowa 525, 526, 99 N. W. 139, holding further that persons may be indicted and convicted for a conspiracy to commit adultery.

Reaffirmed and varied in State v. Chambers, 87 Iowa 6, 7, 43 Am. St. Rep. 349, 53 N. W. 1091; State v. Hurd, 101 Iowa 394, 70 N. W. 614, holding that a man may be guilty of incest without the consent of the female.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

STATE v. POTTER, 30 IOWA 587

1. Intoxicating Liquors — Nuisance — Keeping Building for Purpose of Selling or Unlawful Sale of in—When Landlord Guilty.—If a person leases a building for the purpose of intoxicating liquors being kept therein for unlawful sale, or if they are sold therein with his permission, he may be indicted and convicted under Sec. 1564 of the Code of 1860, pp. 587, 588.

Reaffirmed in State v. Bailey, 31 Iowa 598 (abstract).

SMITH v. DELL & CORCORAN, 30 IOWA 594

(Abstract.)

1. Fraud and Fraudulent Representations—Lessee in Possession of Coal Mine Inducing Sale to Him by—Setting Aside in Equity.—Where the lessee of a coal mine under a lease to pay the owner a certain sum per bushel of all coal mined, makes false represen-

tations of the amount of coal mined, and then makes false representations as to its condition, value, and the purpose for which he wanted it, and the owner in reliance on such acts and representations of the lessee and in ignorance of the true facts, sells it to him for a greatly inadequate price, the sale or transaction will be set aside in an action, by the owner, in equity therefor, p. 594.

Cited in Douglass v. Longee, 147 Iowa 412, 123 N. W. 969, not in point, but upon analogy.

Annotations to Decisions Reported in Volume 31 Iowa

ROBINSON *v.* LAIR, 31 IOWA 9

1. Actions—Written Instruments Sued on—Burden of Proof—When Plaintiff Required to Prove Genuineness of Signature.—Under Chap. 28, Acts of 1862, (9th General Assembly) a party suing upon a written instrument, or any indorsement thereon, the original or a copy of which is attached to the petition, is not required to prove the genuineness of the signature thereto, or indorsement thereon, unless it be denied by such person under oath, pp. 11, 13, 14.

Reaffirmed in Shaw & Schoonover *v.* Jacobs, 89 Iowa 718, 48 Am. St. Rep. 411, 21 L. R. A. 440, 55 N. W. 335, under Sec. 2730 of the Code of 1873, corresponding to the law of the text.

Reaffirmed in Marshall Field Co. *v.* Oren Ruffcorn Co., 117 Iowa 160, 90 N. W. 619, under Sec. 3640 of the Code of 1897, corresponding to the law of the text.

Reaffirmed and explained in Douglass *v.* Matheny, 35 Iowa 113, 114, holding that the denial must be specific and under oath: That an inferential denial is insufficient.

Reaffirmed and explained in Brayley *v.* Hedges, 52 Iowa 624, 3 N. W. 654, holding under Sec. 2730 of the Code of 1873, corresponding to the law of the text, that in the absence of a denial of the genuineness of a signature under oath the law regards it as admitted, and the plaintiff is required to introduce no evidence to prove the signature; but that if the signature be denied by an answer not sworn to, the defendant may support his allegation by proper evidence, the genuineness of the signature being thus put in issue and the burden of proof cast upon defendant.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

2. Negotiable Note—Indorsement of—Guarantee of Payment and Waiver of Demand and Notice by Payee—Effect.—Where the payee of a negotiable note indorses thereon that "for value received, I guarantee the payment of the within note, and hereby waive demand and notice of non-payment," the writing constitutes an indorsement with an enlarged liability, and transfers the title to the holder, p. 14.

Reaffirmed in Iowa Valley State Bank *v.* Sigstad, 96 Iowa 495, 496, 65 N. W. 408; German-American Sav. Bk. of Burlington *v.* Hanna, 124 Iowa 377, 378, 100 N. W. 58, the court holding that when a

negotiable note on its face stipulates that the makers, indorsers and guarantors of this note * * * hereby waive presentment of payment, notice of non-payment, protest, and notice of protest, and due diligence in bringing suit against any party thereto, every indorser thereof accepts its conditions, and the legal effect is to make them liable absolutely in case the maker fails to pay at maturity; and that therefore the fact that a holder of the note writes "payment guaranteed" over the signature of a blank indorser thereof, does not affect or change such liability.

HARRISON v. COLTON, 31 IOWA 16

1. Contracts—Contract Executed on Sunday—Effect—Re-Execution or Ratification on Week-day.—A contract made on Sunday is void, unless it be ratified on a week-day, such as by a new promise to pay, a refusal to rescind on demand made, a partial payment, or the like.

And where parties make a contract on Sunday which is consequently void, they may later on a week-day make another contract regarding the same matter, and the latter will be valid, p. 17.

Reaffirmed and explained in Russell & Co. v. Murdock, 79 Iowa 104, 18 Am. St. Rep. 348, 44 N. W. 238, holding that a contract or note executed on Sunday may be ratified on a subsequent week-day, and is thereupon valid; and that performance, enforcement, or part payment thereof or thereon constitutes such ratification.

STATE v. BENNETT, 31 IOWA 24

1. Criminal Law—Adultery—Indictment for—Evidence—Injured Consort Competent.—Upon the trial of an indictment for adultery against a husband or wife, the injured consort is a competent witness against the accused, pp. 25, 26.

Reaffirmed in State v. Hazen, 39 Iowa 649.

Reaffirmed and extended in State v. Hughes, 58 Iowa 168, 11 N. W. 707, holding further that the rule is equally applicable upon the trial of a married man or woman for bigamy.

Reaffirmed and extended in State v. Chambers, 87 Iowa 4, 5, 43 Am. St. Rep. 349, 53 N. W. 1091, holding further that the wife of accused is a competent witness against him upon the trial of a married man for incest with his step-daughter.

2. Criminal Law—Adultery—Prosecution for—Complaint of Injured Consort.—Under Sec. 4347 of the Code of 1860, a prosecution for adultery can only be commenced upon complaint of the injured husband or wife, p. 25.

Reaffirmed and explained in Bush v. Workman, sheriff, 64 Iowa 206, 207, 19 N. W. 911, holding that (under Sec. 4008 of the Code

of 1873) no prosecution for adultery may be commenced except upon the complaint of the husband or wife of the *accused*: Holding further that where a married man held by a justice of the peace upon a charge of adultery, to answer the action of the grand jury, sues out a writ of *Habeas Corpus*, and the response of the officer having him in custody fails to state that the prosecution was commenced by the petitioner's wife, it is insufficient and the accused should be discharged on such writ.

Cited in State v. Corliss, 85 Iowa 19, 20, 51 N. W. 1154, the court holding that adultery is a public offense, and that an indictment for burglary with intent to commit adultery is good, under Sec. 3891 of the Code of 1873.

Special cross reference. For further cases citing and explaining the text, and many others on the question, see annotations under State v. Roth (17 Iowa 336), Vol. II, p. 535.

WARREN v. HENLEY, 31 IOWA 31

1. Municipal Corporations—Charters of—Authority to "Pave", What Includes—Sidewalk Is Part of a Street.—Authority granted to a city in its charter to cause its streets and alleys "to be paved, and pavements to be repaired" by the owners of abutting lots, or to assess the cost thereof upon the lots, etc., includes the power to improve them by macadamizing, the construction of gutters and the putting in of curbstones. The word "pave" when so used means to cover with brick or stones so as to make a level or convenient surface for horses, carriages or foot passengers. Macadamizing is a peculiar paving of stone within the meaning of the term.

A sidewalk is part of a street, and such authority to "pave" includes the same power as to sidewalks, pp. 35-37.

Reaffirmed in Gallaher v. City of Jefferson, 125 Iowa 330, 101 N. W. 126, under Sec. 782 of the Code of 1897, the case, however, turning on other points.

Reaffirmed and extended in Downing v. City of Des Moines, 124 Iowa 290, 291, 99 N. W. 1067, holding further that under Sec. 792 of the Code of 1897, a city has power to require curbing to be constructed around the edge of a small park in the middle of a street.

Unreported citation, 138 N. W. 856.

Cross Reference. See further on this question, annotations under Rule 2 of Buell v. Ball, Marshall (20 Iowa 282), Vol. II, p. 817; B. & M. Riv. R. R. Co. v. Spearman, and City of Mt. Pleasant (12 Iowa 112), Vol. II, p. 22.

2. Municipal Corporations—Charters Granting Power to Pave Streets, Constitutional—Constitutional Law—Uniform Operation of Laws.—Charters granting to cities the power to pave and

repair streets, and to assess the costs on abutting lot owners, are constitutional. The power granted thereby is in the nature of a special tax for a public benefit; and such charters are not in violation of the constitutional inhibition as to statutes having an uniformity of operation, as they apply equally to all abutting lot owners along the particular street or streets improved or repaired, pp. 39-42.

Reaffirmed in Morrison v. Hershire, 32 Iowa 276, 277; Dewey v. City of Des Moines, 101 Iowa 423, 70 N. W. 607; Allen v. City of Davenport, 107 Iowa 103, 77 N. W. 537; Hackworth v. City of Ottumwa, 114 Iowa 469, 470, 87 N. W. 425; Hedge v. City of Des Moines, 141 Iowa 21, 22, 119 N. W. 283.

Reaffirmed, explained and varied in Yeomans v. Biddle, 84 Iowa 160, 161, 50 N. W. 890, holding that assessment and levy of taxes and assessments in accord with law, by proceedings wherein are provisions for an appeal, or other means of correcting an error, illegality, or want of authority, is not in conflict with the provisions of the constitution against the deprivation of property without due process of law—the court upholding constitutionality of taxation for drainage and ditching law, provided by Secs. 1207, 1213, 1216 of the Code of 1873 and of Chap. 12, Acts of 1878 (17th General Assembly) as amended by Chap. 81, Acts of 1880 (18th General Assembly).

Reaffirmed and qualified in Gatch v. City of Des Moines, 63 Iowa 720, 725, 726, 18 N. W. 311, 313, holding that a law allowing a city to assess a special tax for public improvements (in this case for a sewer), and the ordinance of the city thereunder must provide for notice to the property owner, and a reasonable opportunity for him to appear and object thereto before the tax is finally levied.

Reaffirmed and qualified in Amery v. City of Keokuk, 72 Iowa 703, holding that before a special tax for macadamizing a street can be legally levied on the property of an abutting lot owner, he must have notice and an opportunity to object as to the amount of the tax proposed to be levied.

Cited in City of Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 68, the court holding that Chap. 26 of the Acts of 1872 (14th General Assembly) releasing railroad companies from certain valid city taxes under a prior law, is unconstitutional.

Cited in City of Dubuque v. C. D. & M. R. R. Co., 47 Iowa 205, 207 (dissenting opinion), the majority court holding that it is within the power of the legislature to provide, in a proper manner, for the valuation of property, and to fix its *situs* for the purposes of taxation: Holding further that Chap. 26 Laws of 1872, relative to the assessment for taxation of property of railroad companies by the census board, etc., is constitutional.

Cited in Primghar State Bank v. Rerick, treasurer, 96 Iowa 240, 64 N. W. 802; Scottish Un. & Nat'l Ins. Co. v. Herriott, 109 Iowa

612., 77 Am. St. Rep. 548, 80 N. W. 667; *Herriott v. Potter*, 115 Iowa 652, 653, 89 N. W. 93; *Iowa Mut. Tornado Ins. Ass'n v. Gilbertson*, State Treas., 129 Iowa 666, 106 N. W. 156, holding that a statute meets the constitutional requirement as to being of a general nature and uniform operation, if it applies to all persons coming within the relations, circumstances and situation dealt with by it; and its validity or constitutionality is not affected by the fact that it grants powers, privileges or immunities to, or imposes duties and liabilities upon, or otherwise regulates a particular class of persons, real or legal, when it applies to all of the class.

Cited in *Farwell v. Brick Mfg. Co.*, 97 Iowa 296, 35 L. R. A. 63, 66 N. W. 179, the court holding that agricultural land in a city limits is subject to a special assessment for paving or curbing a street.

Cited in *Ulbrecht v. City of Keokuk*, 124 Iowa 4, 97 N. W. 1083, upholding constitutionality of Sec. 1051 of the Code of 1897 as to the limitation of actions against cities and applying to cities with special charters.

Cited with approval in *Grant v. City of Davenport*, 36 Iowa 405, not in point, but upon analogy.

Distinguished in *C. R. I. & P. Ry. Co. v. City of Ottumwa*, 112 Iowa 305, 306, 51 L. R. A. 763, 83 N. W. 1076, the court holding that the right of way of a railroad (not held by the company in fee, but condemned as required by law therefor) is not subject to assessment and taxation for street improvements and sidewalks; but that the owner of lots abutting on streets, and not the mere owner of an easement thereover, is the party liable therefor.

Distinguished and narrowed in *Iowa Pipe & Tile Co. v. Callanan*, and *City of Des Moines*, 125 Iowa 359, 360, 365, 106 Am. St. Rep. 311, 3 Am. & Eng. Ann. Cas., 7, 67 L. R. A. 408, 101 N. W. 142, holding that when a special assessment for public improvements (in this case for the construction of a sewer) is manifestly unequal and unjust, and is in excess of the benefits conferred on an abutting lot, it is void.

BERTRAM v. CURTIS, 31 IOWA 46

1. Vendor and Purchaser—Party Wall Not an Incumbrance on Lot Sold, When—Rights of Adjoining Lot Owners in Reference to Party Wall.—In the absence of any representations by the vendor of a vacant lot as to the ownership of a wall resting one-half thereon, the presumption of law, under our statute, is that the ownership is in him who built it, or his grantees; for the builder has no legal right to demand, nor is the owner of the vacant lot under any obligation to pay for, the half resting on the vacant lot, until the owner of such lot shall use the same as a party wall, though he *may* do so, or join in

building it. The obligation to pay for the one-half of the party wall on the vacant lot rests upon the grantee or purchaser at the time he uses it, pp. 47-49.

Reaffirmed in Molony v. Dixon, 65 Iowa 138, 139, 54 Am. Rep. 1, 21 N. W. 489.

Reaffirmed and explained in Beggs v. Duling, 102 Iowa 16-18, 70 N. W. 733, holding that before an adjoining owner of land may be liable for one-half of a party wall built by his neighbor, and before the charge for one-half the cost thereof becomes an incumbrance on the former's land, he must use the wall *in a permanent* way.

Reaffirmed and explained in Capital City Inv. Co. v. Burnham, 143 Iowa 147, 121 N. W. 713, holding that under our rule (Code of 1897) a party wall extending not more than nine inches over on adjoining land is not an incumbrance.

Reaffirmed and qualified in Percival v. Colonial Investment Co., 140 Iowa 280, 121 N. W. 713, holding that—under Secs. 2994-3003 of the Code of 1897—if a party wall has been erected by mutual covenant between the grantor and the adjoining owner under which covenant the adjoining owner has acquired the right to rest a part of the wall upon the grantor's premises, then this right, created by the voluntary act of the grantor, becomes an incumbrance.

Unreported citation. 115 N. W. 942.

Cross references. See further on this question, annotations, note and cross reference under Thompson v. Curtis (28 Iowa 229), ante. p. 446; Zugenbuhler v. Gilliam & Thompson (3 Iowa 391), Vol. I, p. 274.

JOHNSON v. SEMPLE, 31 IOWA 49

1. Practice—Appeal—Act of 1866 Dispensing with Motion for New Trial, Constitutional.—Chap. 49, Acts of 1866, (11th General Assembly), dispensing with the motion for a new trial before appeal in civil actions at law, is constitutional, p. 50.

Cited in Sisters of Visitation v. Glass, 45 Iowa 156, not in point.

Special cross reference. For further cases citing and sustaining the text, and others, see annotations under Coffin, Ex'r, v. City Council of Davenport (26 Iowa 515), ante. p. 358.

2. Attorney and Client—Money Collected by Attorney—From What Date He Is to be Charged Interest on.—An attorney is to be charged interest on money collected by him for his client from the time the latter demands payment thereof, or, if he fails to so demand, from the date of commencement of action therefor against the attorney, p. 52.

Reaffirmed in Hollenbeck v. Stanberry & Son, 38 Iowa 327.

RYAN v. DOYLE, 31 IOWA 53

1. Vendor and Purchaser—Purchaser of Land from Vendor Who Holds in Trust, with Knowledge—Rights of.—Where one purchases land of a vendor with knowledge that the latter holds the title in trust for another, he takes the title subject to the rights of and holds as trustee for the person for whom the vendor held, p. 58.

Cited in Truth Lodge No. 213, A. F. & A. M. v. Barton, 119 Iowa 235, 97 Am. St. Rep. 303, 93 N. W. 107, holding that possession of land by a person other than the vendor, is sufficient to put a purchaser thereof upon inquiry and operates as notice of the rights, title and equities of the person in possession.

HURLEY v. POWELL, LEVY & CO., 31 IOWA 64

1. Tax Sale of Lands—Tax Warrant Not Necessary to Validity.—A tax warrant is not essential to the validity of a sale of land for taxes, under the Code of 1860, pp. 65, 66.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Rule 3 of Parker v. Sexton & Son (29 Iowa 421), ante. p. 543.

2. Tax Sale of Land—Conclusiveness of Tax Deed.—Under Sec. 784 of the Code of 1860, a tax deed is conclusive evidence of the regularity and legality of the time and manner of sale of land for taxes and of all the non-essential steps in relation thereto; but is only *prima facie* evidence of the essential steps necessary to the validity thereof. Sec. 784 of the Code above mentioned is only unconstitutional in so far as it seeks to make a tax deed *conclusive* evidence of the validity and regularity of such essential steps.

So a tax deed is *conclusive* evidence of due notice of the sale, and of the compliance with Sec. 771 of the Code of 1860, in reference to the filing of the certificate and affidavit of due publication of notice in the office of the clerk of the county board of supervisors, pp. 65, 66.

Reaffirmed and explained in Davis v. Magoun, 109 Iowa 328, 329, 80 N. W. 430, holding that any defect, or irregularity in the advertisement or notice of a tax sale, or of the posting or publication thereof, will not, under Sec. 880 of the Code of 1873, affect either the sale or the deed made thereunder; that such a tax title is valid, both before and after the making of the tax deed.

Reaffirmed and explained as to first paragraph in Phelps v. Meade, 41 Iowa 472, 473, holding that a tax deed is conclusive evidence of the due performance and regularity of every step and proceeding in tax sales, as to time and manner of sale, etc.; that no matter how informal or irregular the sale may have been conducted by the treasurer, if there was a *bona fide* sale, in substance or in fact, the tax deed is conclusive

evidence that it was done at the proper time and manner, these being merely directory and not fundamental steps.

Reaffirmed and explained as to second paragraph in Shawler v. Johnson, 52 Iowa 476, 3 N. W. 608, holding that a defect in the advertisement or notice of a tax sale, will not invalidate it; that such an advertisement or notice which does not contain a description of the land to be sold for taxes, but which is otherwise correct, is sufficient.

Cross references. See further on this question, annotations under McCready v. Sexton & Son (29 Iowa 356, ante. p. 539; Allen v. Armstrong (16 Iowa 508), Vol. II, p. 466.

3. Tax Sale of Land—Part of Tax Legal and Part Illegal—Sale Is Valid.—A sale of land for taxes part of which is legal and part illegal, is valid, p. 66.

Reaffirmed in Corning Town Co. v. Davis, 44 Iowa 633.

Cross reference. See further on this question, annotations under Rule 4 of Eldridge v. Kuehl (27 Iowa 160), ante. p. 381.

SANDFORD v. MARTIN, 31 IOWA 67

1. Statutes—Construction of—Statutes for Condemnation of Land for Public Purposes—Sec. 1278 of the Code of 1860, Construed—Ferry Landing.—Statutes allowing condemnation of land for public purposes and the taking of private property therefor, are to receive a strict construction, and are not to be held to include purposes not clearly within the legislative intention.

So Sec. 1278 of the Code of 1860, granting the right to condemn private property for roads, railroads, bridges, and other specified purposes, does not allow condemnation proceedings for a ferry landing, pp. 67-69.

Cited in C. R. & M. R. R. Co. & I. R. L. Co. v. Carroll County, 41 Iowa 168, the court holding that grants of land by Congress are to be strictly construed and most strongly construed against the grantee.

Cited in Brown v. Bell Company, and Lane, 146 Iowa 99, 1912 B., Am. & Eng. Ann. Cas., 852, 123 N. W. 234, the court holding that where specific words of the same nature are used in a statute followed by the use of general ones, these general terms take their meaning from the specific ones and are restricted to the same *genus*; in other words, comprehend only those things of the same kind as the specific ones; the court holding that this rule is not in contravention of Sec. 3446 of the Code of 1897.

LEACH v. HALE, REC'R, 31 IOWA 69, 7 AM. REP. 112

1. National Banks—Deposit of Bonds with to be Exchanged for Other Bonds—Liability of Bank.—Where a person deposits certain bonds with a national bank, to be by it exchanged for other bonds

and without compensation to the bank, and it thereafter refuses, upon demand, to deliver one or the other kind of bonds to the depositor, it is liable to him for the value of the bonds deposited. Such a transaction is not a bailment, but is within the powers conferred by the National Banking Act., pp. 72, 73.

Cited in Hillis v. Ch. R. I. & P. Ry. Co., 72 Iowa 231, 33 N. W. 645, not in point.

CRAFTS, ADM'R, v. CLARK, 31 IOWA 77

(Later appeal, 38 Iowa 237.)

1. Foreign Judgment—Faith and Credit Given in Action on in This State—Foreign Judgment Invalid Here—Proof of Validity.—When by the laws, usages and practice of a State, a judgment rendered therein is valid, the same faith and credit will be extended to it here, and it will be enforced by the courts of this State. But when a foreign judgment is sued on in this State which is invalid by the laws hereof, proof of its validity as above where rendered is necessary to its enforcement by a court of this State, pp. 79, 80.

Reaffirmed in Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa 600, 82 Am. St. Rep. 529, 82 N. W. 1026.

Reaffirmed, explained and extended in Varner v. Interstate Exchange, 138 Iowa 204, 115 N. W. 1112, holding further that statutes of another state may be proved by printed copies duly authenticated; but that a party relying upon such statutes must plead and prove them as any other issuable fact: That the unwritten law and non-statutory rules and approved methods of practice of another state may be proved as facts by parol evidence, or by the reports of adjudged cases in the courts of such state: The court further holding that in the absence of evidence as to the law and practice in another state, it will be presumed that they correspond with our own, and that a sheriff's sale and deed made thereunder that are invalid here are invalid there.

Cited in Davis v. Ch. R. I. & P. Ry. Co., 83 Iowa 746, 49 N. W. 78; Tolman v. Janson, 106 Iowa 457, 76 N. W. 733, the court holding that when a contract made and to be performed in a foreign state is sued on in a court of this state, it will be presumed, in the absence of proof to the contrary, that the laws of the foreign state governing it, are the same as those of this.

Cited with approval in Stephens v. Williams, 46 Iowa 541, the court holding that the courts of this State do not take judicial notice of the statutes of other states, but, in the absence of proof, presume them to be the same as our own: The court holding, therefore, that a wafer with the name and official character of a notary written thereon in pen, and attached to an affidavit purporting to have been sworn to before a notary public of Michigan, is insufficient as a seal, in the absence of proof of the laws of that state recognizing it as such.

Cross References. See further on this question, annotations under *Greasons v. Davis* (9 Iowa 219), Vol. I, p. 567.

STODDARD *v.* THOMPSON, 31 IOWA 80

1. **Res Adjudicata—Who Judgment Binding upon.**—One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein, p. 82.

Reaffirmed and explained in *Marsh v. Smith*, 73 Iowa 297, 34 N. W. 867, holding that one who, though not a party to an action, is interested in the controversy and employs counsel to aid in its defense, is bound by the judgment therein.

Reaffirmed and explained in *Bellows v. Litchfield*, 83 Iowa 44, 48 N. W. 106; *Baxter v. Myers*, 85 Iowa 330, 39 Am. St. Rep. 298, 52 N. W. 234; *Montgomery v. Alden*, 133 Iowa 676, 119 Am. St. Rep. 648, 108 N. W. 234; *Canal Construction Co. v. Woodbury County*, 146 Iowa 530, 531, 121 N. W. 557, holding that a judgment is binding upon any person who manages a litigation in his own interest and employs counsel therefor, whether he be a party thereto or not.

Reaffirmed and explained in *Citizens' Nat'l Bk. of Danvenport v. City Nat'l Bank of Clinton*, 111 Iowa 213, 214, 82 N. W. 465, holding that when a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit, and requested to take upon himself the defense of it, he is no longer regarded as a stranger, because he has a right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real or nominal party upon the record: That in every case if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not, of every fact established by it; but that in such case no judgment can be rendered against such a party who does not defend, and therefore the plaintiff may subsequently sue him upon the same cause of action.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of *McNamee v. Moreland* (26 Iowa 96), ante. p. 308.

TEWKESBURY *v.* BENNETT, 31 IOWA 83

1. **Sales of Personal Property—Warranty—When False Representations by Seller Amounts to—Question for Jury.**—Remarks which may be construed as simple praise or commendation imply no warranty; but any distinct assertion or affirmation of quality, made by

the owner during a negotiation for a sale of a chattel, which it may be supposed was intended to cause the sale, and was operative in causing it, will be regarded either as implying or as constituting a warranty: The affirmation must be made to assure the buyer of the fact asserted, and induce him to make the purchase; and must be so received and relied on by him. In an action for damages for breach of warranty under such facts, the question of whether or not there was a warranty within this rule, is for the jury, pp. 84, 85.

Reaffirmed in McGrew v. Forsythe, 31 Iowa 181; McDonald Mfg. Co., v. Thomas, 53 Iowa 561, 5 N. W. 739; Jackson & Sons v. Mott, 76 Iowa 266, 41 N. W. 13; Richardson v. Coffman, 87 Iowa 123, 54 N. W. 357; Mitchell v. Pinckney, 127 Iowa 698, 104 N. W. 287; Schlichting v. Rowell, 140 Iowa 735, 119 N. W. 152; Swift & Co. v. Redhead, 147 Iowa 100, 101, 122 N. W. 142.

Reaffirmed and explained in Figge v. Hill, 61 Iowa 432, 16 N. W. 340, holding that the question whether there has been a warranty or not depends upon the intention and understanding of the parties, as collected from their acts and expressions at the time of sale; and when the contract is not wholly in writing, is one of the facts for the jury, under the direction of the court.

And see 152 Iowa 272, not yet published.

Unreported citation 132 N. W. 377.

Cross references. See further on this question, annotations under Hughes v. Funston & Smith (23 Iowa 257), ante. p. 101; Holmes v. Clark, (10 Iowa 423), Vol. I, p. 719.

CITY OF DES MOINES v. DORR, 31 IOWA 89

1. Municipal Corporations—Assessments for Building Sidewalks—Corner Lot Fronting on Two Streets.—A corner lot fronting on two streets in a city is subject to be assessed for the building of sidewalks the length of its frontage on both streets, if the city, by ordinance, so requires, p. 93.

Reaffirmed in Morrison v. Hershire, 32 Iowa 279.

CITY OF BURLINGTON v. PUTNAM INSURANCE CO., 31 IOWA 102

1. Municipal Corporations—Taxation and Revenue—Insurance Companies—Annual Premiums of Not Taxable as Personal Property—Nature of Annual Premiums.—The premiums received by an agent of an insurance company is not property, and is not assessable as such against a company, for taxation for city purposes. Such premiums are in the nature of a gross income, and is not property.

Special cross reference. For cases citing the text, and others, see annotations under City of Dubuque v. N. W. Life Ins. Co. (29 Iowa 9), ante. p. 489.

2. Municipal Corporations—Licenses—Proper Exercise by City of Power to License.—Power to a city to license will not authorize it to tax under the guise of a license. Licenses are a part of the police regulations of a city, and are only to be imposed to such extent as will reasonably compensate the city for issuing and enforcing them, and the care exercised by the city over the particular person licensed. But a license will not be declared void by the courts, unless the sum charged is manifestly unjust or oppressive, or is required for the purpose of raising revenue.

So a city may license insurance companies and charge a license fee according to the income of each company, pp. 105, 106.

Reaffirmed as to first paragraph in Easterly v. Town of Irwin, 99 Iowa 697, 68 N. W. 920.

Reaffirmed and explained in Town of Decorah v. Dunstan Bros., 38 Iowa 99; *City of Ottumwa v. Zekind*, 95 Iowa 626-628, 58 Am. St. Rep. 447, 29 L. R. A. 734, 64 N. W. 647, holding that licenses are a part of the police regulations of a city, and should be charged for as such, and only to such extent as may reasonably compensate the city for issuing and enforcing the licenses, and for the care exercised by the city under its police authority over the particular person licensed: And holding also, that the amount of the license fee or charge is to be considered, in determining whether the exaction is not really one of revenue or prohibition, instead of one of regulation under the police power; that the charge made will be presumed to be reasonable, and within the authority conferred upon the municipality, unless the contrary appears upon the face of the ordinance, or is, by evidence, shown: That a municipality, under the authority given to it to license, has the right to impose such a charge as will cover, not only the necessary expenses of issuing it, but also the additional labor of officers, and other expenses imposed by the business, but nothing beyond this.

Reaffirmed and explained in City of Burlington v. Bumgardner, 42 Iowa 674, holding that taxes cannot be imposed by a city under authority to license: And holding also, that the power to a city to impose a tax does not confer authority to license.

Reaffirmed and explained in City of Fairfield v. Shellenberger, 135 Iowa 618, 113 N. W. 460, holding that the power to license conferred by Sec. 700 of the Code of 1897, is a grant of power to enact police regulations for the general welfare of the particular community: And that thereunder a city may license professions and occupations.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

WIER v. STILL, 31 IOWA 107

1. Marriage—Fraud—False Representations—Setting Aside in Equity.—If one of the parties to a marriage was legally incapable of

consenting thereto, or it was celebrated by the use of force or fraud on one of the parties, it is void and will be so declared by a court of equity.

But mere false representations by one of the parties as to his fortune, character or social standing, will not avoid the marriage, p. 110.

Reaffirmed as to first paragraph in Shaw v. Shaw, 92 Iowa 727, 61 N. W. 369.

Reaffirmed and extended in Floyd County v. Wolfe, 138 Iowa 752, 753, 117 N. W. 34, holding further that where a marriage is annulled by a court of equity by reason of the insanity of the woman at the time of its celebration, she is not entitled to homestead in the land of the man with whom the marriage was attempted.

(Note.—See further, *Drummond v. Irish*, 52 Iowa 41, 2 N. W. 622; *McFarland v. McFarland*, 51 Iowa 567, 2 N. W. 269; *Wilson v. Wilson*, 49 Iowa 544, some important cases on this question, not citing the text.—Ed.)

Cross references. See in this connection, *Powell v. Powell*, 26 Am. Rep. 774; *Stewart v. Vandervoort*, 12 L. R. A. 50.

SAYRE v. WHEELER, 31 IOWA 112

(Later appeal, 32 Iowa 559.)

1. Contracts—Note Executed on Sunday, Void, When.—A promissory note executed on Sunday is void under the law of this state, unless the parties conscientiously observed the seventh day of the week instead of Sunday; and this exception must be proved by the party seeking to recover on the note, p. 114.

Reaffirmed in Sayre v. Wheeler, 32 Iowa 561.

Reaffirmed and varied in State v. Mulhern, 130 Iowa 48, 106 N. W. 268, holding that upon the trial of an indictment for nuisance in selling intoxicating liquor to a minor, proof that the purchaser thereof was under twenty-one years of age is sufficient to convict, unless the accused proves that he (the purchaser) was married at the time the liquor was sold and that therefore, the statute (Code of 1897) does not apply.

Reaffirmed and extended in Clough v. Goggins, 40 Iowa 326, holding further that the court will take judicial notice that a note sued on is dated on Sunday; and that, therefore, the question of the invalidity of such a note sued on, may be raised by demurrer.

Cross reference. See further on this question, annotations under *Pike v. King* (16 Iowa 49), Vol. II, p. 403.

2. Same—Note Executed on Sunday in Foreign State—Presumption.—Where a note executed on Sunday in a foreign state is sued on in a court of this state, it will be presumed, in the absence

of proof to the contrary, that the law of the foreign is the same as the law of this state, p. 114.

Reaffirmed in Sayre v. Wheeler, 32 Iowa 561.

Special cross reference. For cases citing and extending the text, and many others in this connection, see annotations under Crafts, Adm'r, v. Clark (31 Iowa 77), ante. p. 650.

3. Promissory Note Executed on Sunday, Void—Recovery of Consideration or on Original Contract by Payee.—Although a promissory note executed on Sunday is void, still the payee may recover of the maker the consideration paid, or on the original valid contract disregarding the note, p. 114.

Cited in Stover v. Flower, 120 Iowa 521, 94 N. W. 1103, the court holding that in the case of an illegal contract the party performing his part cannot recover on the ground of an implied promise on the part of the party receiving the benefit therefrom to pay therefor, as the law will imply no promise to pay for benefits received under an illegal contract on account of performance thereof by the other party; but that so long as an illegal contract remains executory, and the illegal purpose has not been put in operation, the one who has paid money thereon to the other party may repudiate the contract and recover the money.

Cross reference. See further on this question, Rule 2 of Pike v. King (16 Iowa 49), Vol. II, p. 403.

STURMAN v. STONE, 31 IOWA, 115

1. Attachment—Defenses.—In an attachment action no issue can be joined—under Sec. 3238 of the Code of 1860—upon the averment of facts contained in the affidavit on which the writ is issued, p. 118.

Unreported citation, 134 N. W. 593.

CITY OF KEOKUK v. LOVE, 31 IOWA 119

1. Principal and Surety—Subrogation, Extent of.—The equity of sureties to subrogation extends, not only to the rights of the creditor as against the principal, but to all rights of the creditor respecting the debt which the sureties pay, p. 123.

Reaffirmed and explained in Searing v. Berry, 58 Iowa 23, 11 N. W. 709, holding that a surety upon payment of the debt is, in equity, subrogated to all the rights of the creditor, and may so enforce all liens, priorities, and means of compelling payment possessed by the creditor: And if the debt be reduced to judgment the surety is entitled to an assignment thereof, and may enforce all rights thereby given, by an action in equity.

Reaffirmed and explained in Manning v. Ferguson, 103 Iowa 567, 568, 72 N. W. 764, holding that when a surety pays the debt

of his principal he is entitled to the benefit of all securities which the principal debtor has placed in the hands of his creditor to secure the debt.

Reaffirmed, varied and qualified in Whitehouse v. Am. Surety Co. of N. Y., 117 Iowa 331, 90 N. W. 728, holding that a creditor, although he has a lien on the property of the principal, may look to the surety for the payment of his debt, and is not obliged to first pursue a statutory remedy against the principal, (unless requested by the surety in writing, as provided by Secs. 3064 and 3065 of the Code of 1897), provided he does not release the lien on the property, in which latter case the surety is discharged to the extent of the property released.

Cited with approval in Hipwell v. Nat'l Surety Co., 130 Iowa 669, 105 N. W. 323, the case turning on another question and a peculiar state of facts rendering the rule inapplicable.

Cited in Bockholt v. Kraft, 78 Iowa 666, (dissenting opinion), 43 N. W. 540, the majority court holding that the right of a surety to subrogation is subject to and qualified by Sec. 1993 of the Code of 1873, requiring all other property on which a lien is given to secure a debt to be first exhausted before the homestead be sold to satisfy it: That where a surety (a wife) mortgages her real estate along with the homestead of her husband to secure a debt of her husband, she cannot, upon paying the debt, subject the homestead for her reimbursement.

Cross references. See further on this question, annotations under Chambers v. Cochran & Brock (18 Iowa 159), Vol. II, p. 606; Brought v. Griffith and McCleary (16 Iowa 26), Vol. II, p. 397.

RIMA v. COWAN, 31 IOWA 125

1. **Tax Deed to Land—Conclusiveness of Recitals in.**—The recitals of a tax deed to land are conclusive, under Sec. 784 of the Code of 1860, as to the *manner* of the sale according to law.

So a tax deed to several parcels of land reciting that they were sold separately, is conclusive of that fact, pp. 126-128.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under McCready v. Sexton & Son (29 Iowa 356), ante. p. 539.

Cross references. See also, in this connection, annotations under Corbin v. De Wolf (25 Iowa 124), ante. p. 244; Boardman v. Bourne (20 Iowa 134), Vol. II, p. 791.

SNYDER v. ELDRIDGE, 31 IOWA 129

1. **Appeal in Law Actions—Errors Assigned but Not Argued and Relied on—Practice.**—Upon an appeal to the Supreme Court in

an action at law, errors not argued and relied upon, although set out in the assignment of errors, will not, under the Code of 1860, be considered, p. 130.

Reaffirmed in Abbot v. Brd. of Supervisors of Scott County, 36 Iowa 356; Cook v. Sioux City & Pac. R. R. Co., 37 Iowa 428; Wiley v. Griswold, 41 Iowa 377.

Cited in Heaton v. Fryberger, 38 Iowa 207 (dissenting opinion), the majority court opinion not in point.

Cross references. See further on this question, annotations under Shaw v. Brown (13 Iowa 508), Vol. II, p. 180.

2. Appeal from Order Refusing to Grant New Trial—Conflicting Evidence—Verdict Contrary to Evidence as Ground for Reversal.—A judgment will not be reversed upon appeal because the verdict was not supported by the evidence, where the evidence is conflicting and the court below which heard the evidence, with full opportunity for observing the manner and appearance of the witnesses, has overruled appellant's motion for a new trial on that ground, p. 130.

Reaffirmed and extended in Dove v. Independent Sch. Dist. of Keokuk, 41 Iowa 692, holding further that the rule is equally applicable where a law action is tried by the court instead of a jury, and that, in such case, the finding of the court will be treated upon appeal as the verdict of a jury.

Cross reference. See further on this question, annotations under Shepherd v. Brenton (15 Iowa 84), Vol. II, p. 308.

3. Appeal—Instructions not Excepted to Below at Time Given not Ground for Reversal.—Under Sec. 3106 of the Code of 1860, an exception to an instruction given or refused must be taken at the time thereof or it will not be considered or be cause for reversal upon appeal, pp. 130, 131.

Reaffirmed in Snyder v. Nelson, 31 Iowa 240.

(Note.—There are other cases, sustaining, but not citing the text.—Ed.)

Cross reference. See further in this connection, annotations under Rule 5 of Dav. Gas L. & Coke Co., v. City of Davenport (13 Iowa 229), Vol. II, p. 140.

WILHELM v. FIMPLE, 31 IOWA 131, 7 AM. REP. 117

1. Appeal—Instructions Refused Not Prejudicial no Ground for Reversal.—The refusal of the trial court to give an instruction offered by a party upon a jury trial will not be ground for reversal, when it was substantially embodied in the charge of the court, and could not have prejudiced the substantial rights of the party, p. 135.

Reaffirmed and extended in Blackburn v. Powers, 40 Iowa 683, holding further that it is not enough for appellant to show error committed by the trial court; he must further affirmatively show from the record upon appeal that such error prejudiced his substantial rights.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

2. Vendor and Purchaser—Mortgage on Land—Purchaser Not Bound to Pay Purchase Price and Accept General Warranty Deed until Satisfaction or Release of.—A purchaser of land which is mortgaged, is not bound to pay the purchase price and accept a general warranty deed until the mortgage is satisfied by the vendor and the lien is removed from the property, p. 136.

Reaffirmed and explained in Martin v. Roberts, 127 Iowa 220, 102 N. W. 1127, holding that where a contract for the sale of land stipulates that the vendor is to execute a deed thereto with the usual covenants of warranty, upon the purchaser paying a balance of the purchase price at a certain date, and the vendor, before the date that such balance or purchase price is due, executes a lease of the land to a third party, and puts him in possession thereof, such acts constitute a renunciation or rescission of the contract of sale, and the purchaser may sue the vendor for the amount of the purchase price previously paid, without tendering the balance thereof.

Cross reference. See further on this question, annotations under Van Wagner v. Van Nostrand (19 Iowa 422), Vol. II, p. 744.

BROWN v. BRIDGES, 31 IOWA 138

1. Adverse Possession—What Constitutes—Person Holding by May Sue for Trespass.—One in peaceable possession of land to a hedge or fence, and who cultivates and claims the ownership openly, notoriously and adversely for more than ten years, acquires title by adverse possession, and may maintain an action for trespass thereon, as if he held by title direct from the government, and regardless of where the true or original corner or line between it and adjoining land was located, pp. 141, 142.

Reaffirmed in Meyer v. Weigman, 45 Iowa 581, 582; Tracy v. Newton, 57 Iowa 212, 213, 10 N. W. 637.

Reaffirmed and explained in Grube v. Wells, 34 Iowa 149-152; Fulmer v. Beck, 105 Iowa 521, 75 N. W. 368, holding that in order to constitute adverse possession of land, there must be an actual possession for the statutory period under a claim or color of title, and under which the party claiming the right has in good faith and continuously held as against the owner for such time.

Reaffirmed and explained in Fulmer v. Beck, 105 Iowa 521, 75 N. W. 368, holding that adverse possession must be with an intent to claim title, under claim of ownership of the land.

Reaffirmed and extended in Libbey v. Young, 103 Iowa 260, 261, 72 N. W. 521, holding further that where one holds possession of a part of a subdivision of land under color of title or a claim of right, such possession, color or claim will be presumed to extend to the entire subdivision, until this presumption is overcome by proof.

Reaffirmed and varied in Dodge v. Davis, 85 Iowa 80-82, 52 N. W. 3, holding that when a person has the right of property in land and also the right to immediate possession he may maintain an action for trespass thereon, although the actual possession be in another: Hence holding that a tenant in common whose interest is held adversely by another one, or who has been ousted by the latter, may sue the latter for his share of the rents and profits, and for trees cut and carried away by the latter (or co-tenant in possession).

Cited with approval in Waltemeyer v. Wis., Iowa & Neb. Ry. Co., 71 Iowa 628, 33 N. W. 141, an action for trespass wherein the plaintiff failed to prove either a documentary or a possessory title.

Cross references. See further on this question, annotations and cross references under Hamilton v. Wright (30 Iowa 480), ante. p. 628; Close v. Sam (27 Iowa 503), ante. p. 428; Booth & Graham v. Small (25 Iowa 177), ante. p. 254.

2. Appeal—Instructions to be Considered Together on—When Misleading or Erroneous Instructions Not Reversible Error.—Upon appeal all the instructions given will be considered and construed together. If as a whole they contain a correct exposition of the law, the Supreme Court will not reverse because when considered separately, they are objectionable or erroneous. If, however, when so considered, they present a conflict, tending to mislead the jury they will be ground for reversal, p. 143.

Reaffirmed in Belair v. C. & N. W. R. R. Co., 43 Iowa 670; State v. Maloy, 44 Iowa 107; Wimey v. Ch. M. & St. P. Ry. Co., 92 Iowa 624, 61 N. W. 219.

MIDDLETON V. MIDDLETON, 31 IOWA 151

1. Evidence—Dying Declarations—For What Admissible—Proof of Advancement by Father.—Dying declarations are admissible, as such, only in cases of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject thereof. They are not admissible against an heir to prove an advancement made to him by his father, p. 152.

Cited in Ellis v. Newell, 120 Iowa 75, 94 N. W. 464, the court holding that subsequent declarations by a donor (father) are inadmissible to prove that a transfer of property was a gift and not an advancement.

2. Evidence—Advancement—Declarations of Deceased Parent against Interest Admissible.—Declarations of a deceased parent made

against his pecuniary interest are admissible against his heirs claiming under him and under the transaction about which the declarations were made.

So declarations of a deceased father made about the time of the sale of a farm to his son to the effect that the latter had fully paid him for the land, are admissible against the heirs to disprove that the sale was intended as an advancement, p. 153.

Reaffirmed and extended as to first paragraph in Wright v. Reed, 118 Iowa 336, 92 N. W. 62, holding further that declarations concerning the subject-matter of a civil action between third persons are receivable in evidence therein when the declarant is dead, they were against his pecuniary interest at the time that they were made, were of a fact or facts in relation to which the declarant was immediately and personally cognizant, and it further satisfactorily appears by proof, that the declarant had no probable motive to speak falsely.

Distinguished and narrowed in Ellis v. Newell, 120 Iowa 73-75, 94 N. W. 463, 464, holding that subsequent declarations by a donor (father) are inadmissible to prove that a transfer of property was a gift and not an advancement.

Cross reference. See further on this question, annotations under Rule 2 of Mahaska County v. Ingalls, Ex'r (16 Iowa 81), Vol. II, p. 410.

3. Evidence—Advancement—Burden and Sufficiency of Proof.

—In an action by the heirs of a decedent claiming an advancement against an heir, the burden of proof is on the plaintiff to establish the advancement by evidence; but their evidence need not be *conclusive*, and it is sufficient if they establish it by a preponderance of or by satisfactory evidence, p. 153.

Cited in Bissell v. Bissell, 120 Iowa 130, 94 N. W. 466, the court holding that money paid to or for a child for his education, maintenance, or support, or for his pleasure or travel, will not ordinarily be considered an advancement; nor will expenses incurred in the discharge of ordinary parental duties: That if the provision is made for the child's permanent good, as for starting him in business, it will be so considered in the absence of evidence to the contrary; and that proper evidence of the intention of the parent is, in such cases, always admissible, and but slight evidence is needed to overcome the presumption stated.

4. Appeal—Erroneous Instruction—When Not Ground for Reversal.—Although an instruction given by the trial court was erroneous, still it will not be cause for reversal when the verdict of the jury was manifestly right, and had it been for the appealing party, it would have been the duty of the lower court to grant a new trial, pp. 153, 154.

Reaffirmed in Croddy v. Ch. R. I. & Pac. Ry. Co., 91 Iowa 604, 605, 60 N. W. 216.

Reaffirmed and explained in First Nat'l Bk. of Ft. Dodge v. Breese, Whitlock & Co., 39 Iowa 645, holding that the giving of an erroneous instruction, which, under the testimony, could work no prejudice to the party complaining, will not be regarded as reversible error.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

LAMB v. WITHROW, 31 IOWA 164

1. Limitation of Actions—Principal and Surety—When Surety Barred as to Action against Principal.—When a surety pays the note of his principal, and the fact of suretyship is not disclosed by the note and depends on parol evidence to establish it, the right of action by the surety against the principal for the amount paid, under a subrogation to the rights of the creditor, is founded on an unwritten or implied contract, and is barred—under the Code of 1860—unless the action is commenced within five years after payment of the note by the surety.

And the above is the rule although the note is merged into a judgment, pp. 167, 168.

Reaffirmed in Johnston v. Belden, 49 Iowa 302, 303; Preston v. Gould, 64 Iowa 48, 19 N. W. 836; Harrah v. Jacobs, 75 Iowa 73, 1 L. R. A. 152, 39 N. W. 188, under the Code of 1873.

Reaffirmed in Van Patten v. Waugh, 122 Iowa 303, 98 N. W. 120, under the Code of 1897.

Reaffirmed and qualified in Dunton v. McCook, 93 Iowa, 264, 61 N. W. 679, holding that a debt against which the statute may be successfully pleaded is not extinguished as in the case of payment, but may be enforced if the statute is not relied upon as a defense; and that the right to plead the statute is ordinarily personal with the debtor, and, if he waive it, no one else can rely upon it.

SQUIRES v. MILLETT, 31 IOWA 169

1. Appeal from Justice's to District Court—Docket Fee—Rule of District Court as to—Waiver of Docket Fee.—Where a rule of the district court provides that in case of appeals from justices of the peace, etc., if the appellant, when the papers are left with the clerk within the time prescribed by law, does not pay the docket fee provided by law by noon of the second day of the term, the appellee may pay such fee and have the same placed upon the docket and have the judgment below affirmed, and upon such an appeal the cause is docketed by the clerk without the payment of the fee, and the court there-

after makes orders in the case from term to term, the rule and rights thereunder will be deemed waived, pp. 170, 171.

Reaffirmed and explained in part in Simons v. M. C. & Ft. Dodge R. R. Co., 128 Iowa 146, 148, 103 N. W. 133, holding that an appeal to the district court in a proceeding to condemn land for a right of way of a railroad is—Sec. 2009 of the Code of 1897—perfected by the service of notice on the adverse party and the sheriff; and that from that time until final disposition, the case is in the district court; and that a transcript of the proceedings, etc., before the sheriff, need not be filed until the case is reached for trial; and that in such an instance if the case is docketed in the district court without the payment of the docket fee and without the filing of the transcript, the statute is sufficiently complied with: And holding further that a general appearance by each of the parties and agreements from time to time as to the disposition of the case, which agreements were entered upon the proper records of the court, amounted to a waiver of an entry of the case upon the appearance docket.

Reaffirmed and varied in Cole v. Laub, 35 Iowa 591, holding that pending a motion in the district court to affirm a judgment appealed from a justice's court, the party appealing may pay such docket fee; and, if thereafter, the district court sustains the motion, it will be reversible error in the Supreme Court.

Cited in Vasey v. Parker, 118 Iowa 618, 92 N. W. 710, the court holding that under Secs. 4559 and 3660 of the Code of 1897, the clerk is not required to docket an appeal from a justice's court until the docket fee is paid, and that when it is paid the appellant must see that the case is docketed; that if the fee is not paid and the case is not docketed, it may be dismissed under Sec. 4559; and if the fee is paid, but the case is not docketed, it may be dismissed under Sec. 3660: For, says the court, it is the docketing of the case which gives it standing in the district court.

Unreported citations. 110 N. W. 324; 136 N. W. 711.

Cross references. See further on this question, annotations under Hinman v. Weiser (9 Iowa 561), Vol. I, p. 627; and see, also, annotations under Robertson v. Eldora R. R. & Coal Co. (27 Iowa 245), ante. p. 399.

JACKSON v. CHICAGO & NORTHWESTERN R. R. CO., 31 IOWA 176, 7 AM. REP. 120

1. **Railroad Companies—Duty to Supply Engines with Devices or Contrivances to Prevent Escape of Sparks or Fire—Negligence—Damages.**—It is the duty of a railroad company to supply its engines with the best known devices or contrivances to prevent the escape of sparks or fire, failing which it is guilty of negligence and is liable for damages caused by fires set therefrom, p. 178.

Reaffirmed in Metzgar v. Ch. M. & St. P. Ry. Co., 76 Iowa 389, 390, 14 Am. St. Rep. 224, 41 N. W. 50, holding that such devices or contrivances must be the best *available*, regardless of the usage or custom of railroad companies.

McGREW *v.* FORSYTHE, 31 IOWA 179

1. Sales of Personal Property—Warranty—When False Representations by Seller Amounts to—Question for Jury.—Remarks which may be construed as simple praise or commendation imply no warranty; but any distinct assertion or affirmation of quality, made by the owner during a negotiation for a sale of a chattel, which it may be supposed was intended to cause the sale, and was operative in causing it, will be regarded either as implying or as constituting a warranty: The affirmation must be made to assure the buyer of the fact asserted, and induce him to make the purchase; and must be so received and relied on by him. In an action for damages for breach of warranty under such facts, the question of whether or not there was a warranty within this rule is for the jury, p. 181.

Reaffirmed in Jackson & Sons v. Mott, 76 Iowa 265, 266, 41 N. W. 13; *Richardson v. Coffman*, 87 Iowa 123, 54 N. W. 357; *Schlichting v. Rowell*, 140 Iowa 735, 119 N. W. 152.

Reaffirmed and explained in Figge v. Hill, 61 Iowa 432, 16 N. W. 340, holding that the question whether there has been a warranty or not depends upon the intention and understanding of the parties, as collected from their acts and expressions at the time of sale; and when the contract is not wholly in writing, is one of the facts for the jury, under the direction of the court.

Reaffirmed and explained in Phelps v. James, 79 Iowa 265, 41 Am. St. Rep. 497, 44 N. W. 543, holding further that to render one liable for false representations the falsity of the representations and his knowledge thereof must be established by proof.

And see 152 Iowa 272, not yet published.

Unreported citation, 132 N. W. 377.

Cross references. See further on this question, and in its connection, annotations under *Tewkesbury v. Bennett* (31 Iowa 83), ante. p. 651; *Mitchell v. Moore* (24 Iowa 394), ante. p. 205; *Hallam v. Todhunter* (24 Iowa 166), ante. p. 160; *Hughes v. Funston & Smith* (23 Iowa 257), ante. p. 101; *Holmes v. Clark* (10 Iowa 423), Vol. I, p. 719.

FULLER *v.* CHICAGO & NORTHWESTERN R. R. CO., 31 IOWA 187

(Case involving the same facts, 31 Iowa 211.)

1. Constitutional Law—Railroad Companies—Commerce Between States—Sec. 2 of Chap. 169, Acts of 1862, Constitutional.—Section 2 of Chap. 169, Acts of 1862, (9th General Assembly), re-

quiring railroad companies to post rates of fares and freights, is constitutional under the police power of the state, and is not in contravention of the United States Constitution as to Congress regulating commerce between the states, pp. 201, 209, 210.

Cited in Gatton v. C. R. I. & P. Ry. Co., 95 Iowa 143, 28 L. R. A. 556, 63 N. W. 599, the court holding that a statute authorizing recovery on an interstate shipment, for unjust discrimination in rates by a railroad company is, to that extent, in conflict with the Constitution of the United States granting congress the power to regulate commerce between the states.

Cited in City of Council Bluffs v. K. C. & St. J. & C. B. R. R. Co., 45 Iowa 354, 24 Am. Rep. 773, the court holding that Chap. 6, Acts of 1872 (14th General Assembly) prescribing the duties of railroad companies having *termini* at or near Council Bluffs is in conflict with the United States Constitution granting Congress power to regulate commerce between the states, and is therefore unconstitutional.

FULLER v. CHICAGO AND NORTHWESTERN R. R. Co., 31 IOWA 211 .

Cross reference. As the rule cited in this case is the same as the next preceeding case, and the cases citing are the same, see Fuller v. Ch. & N. W. R. R. Co., (31 Iowa 187), next preceding for the annotations of this one.

MILLER v. MUTUAL BENEFIT LIFE INSURANCE CO., 31 IOWA 216, 7 AM. REP. 122

(Later Appeals 34 Iowa 222; 39 Iowa 304.)

1. Insurance Companies—Knowledge by Agent, Binding on Company—Acts of Agent, When Binds Company.—An insurance company that transacts business through an agent having authority to solicit, make out and forward applications for insurance, to deliver over policies when returned, and to collect and transmit premiums, is charged with and bound by knowledge acquired by the agent when engaged in procuring an application, and by his acts at such time in relation thereto, pp. 223-226, 235.

Reaffirmed in Jordan v. State Ins. Co., 64 Iowa 219, 19 N. W. 918; Wilson v. Anchor F. Ins. Co., 143 Iowa 462, 122 N. W. 159.

(Note.—There are numerous other cases sustaining, but not citing the text.—Ed.)

Cross reference. See Rule 2 hereof and cross references there found.

2. Insurance Companies—False Statement in Application for Policy—Estoppel by Knowledge of Agent.—Where the insured makes a false statement in an application for a policy of insurance, but it is known to be false at the time by the agent of the insurer

(company), which agent has the powers set out in Rule 1 hereof, the company is estopped from relying on the falsity of such statement to avoid the policy issued, p. 235.

Reaffirmed in Beotcher v. Hawkeye Ins. Co., 47 Iowa 255; Eggleston v. Council Bluffs Ins. Co., 65 Iowa 316, 317, 21 N. W. 656; Stone v. Hawkeye Ins. Co., 68 Iowa 742, 56 Am. Rep. 870, 28 N. W. 49; Siltz v. Hawkeye Ins. Co., 71 Iowa 716, 29 N. W. 608.

Reaffirmed and explained in Williams v. Niagara F. Ins. Co., 50 Iowa 568, holding that the receiving by an insurance company of the premium on a policy after the occurrence of facts upon which the company might declare it forfeited, and with full knowledge thereof, waives the right to treat it as forfeited therefor: And that this is the Rule although the policy provides that none of its conditions can be waived except by written indorsement thereon.

Reaffirmed and explained in Jordan v. State Ins. Co., 64 Iowa 218, 219, 19 N. W. 918, holding that an insurance company issuing a policy and receiving a premium thereon, with knowledge of facts which are breaches of the warranties by the assured, and of the conditions of the policy, will be estopped to deny the validity of the instrument, and will be regarded as having waived the violated conditions.

Reaffirmed and varied in Mayer v. Mut. L. Ins. Co., 38 Iowa 308-310, 18 Am. Rep. 34, holding that when a person who is employed in the office of the general agent of an insurance company and who is paid by the company, calls upon an insured and collects and gives receipts for several premiums, and promises the insured to call upon him at his place of business and collect subsequent premiums when they were due, the insured has a right to rely thereon, and the company cannot claim a forfeiture of the policy by reason of the insured failing to go to the office and pay a premium when it became due.

Cited in Dalton v. Milwaukee Mechanics' Ins. Co., 126 Iowa 368, 102 N. W. 124, not in point, but upon analogy.

Cross reference. See further on this question, annotations under Rules 3-5 of Viele v. Germania Ins. Co., (26 Iowa 9), ante. p. 298.

3. Insurance Policies—When Statements in Application are Warranties—When Application Part of Policy—Construction of Policy—Burden of Proof as to Warranties.—Statements of facts or agreements in an application for a policy of insurance are to be construed as *representations*, unless converted into warranties by force of a reference to them in the policy, and a clear purpose, manifest in the papers thus connected, that the whole shall form one entire contract. When the reference to the application is expressed to be for another purpose, or when no purpose is indicated, to make it part of the policy, it will not be so treated.

A warranty constitutes a part of the contract, and it is necessary that it should be exactly and literally complied with; but a representa-

tion is collateral to the contract, and it is sufficient if it be equitably and substantially complied with.

In case of a warranty the burden of proof is upon the party seeking indemnity to establish a case in all respects in conformity with the terms under which the risk was assumed; but in case of a representation the burden is cast upon the defendant to set forth and prove the collateral facts upon which he relies.

A policy of insurance is to be construed strictly against the company, pp. 226, 227.

Reaffirmed as to first and second paragraphs in Mandego v. Centennial Mut. L. Ass'n, 64 Iowa 137, 17 N. W. 657, holding that when an application is made part of the policy of insurance, it is immaterial in what part of either paper the condition is found which renders the policy void; and that it may even be found partly in one and partly in the other.

Reaffirmed as to last paragraph in Matthes v. Imperial Accid. Ass'n, 110 Iowa 228, 229, 81 N. W. 486; Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co., 110 Iowa 432, 80 Am. St. Rep. 311, 81 N. W. 710, holding that a policy of insurance is to be construed most strongly against the company and most favorable to insured.

Reaffirmed and explained as to first and second paragraphs in Stewart and Godwin v. Eq. Mut. L. Ass'n of Waterloo, 110 Iowa 530, 531, 81 N. W. 782; Nelson v. Nederland L. Ins. Co., 110 Iowa 602, 81 N. W. 807, holding that where, by its terms, an application for a life insurance policy becomes part of the policy or contract which is to be void if any answers therein are untrue, then if any such answers are untrue the policy will be void, irrespective of their importance or materiality.

Reaffirmed and qualified in part in Wilkins v. Germania Fire Ins., Co., 57 Iowa 531, 532, 10 N. W. 916, holding that as a general rule the burden is on insured who sues upon a policy of insurance to prove, as a condition to his recovery, the truth of matters warranted by him; but that this rule does not apply where the defendant (Ins. Co.) assumes the burden of proving their falsity or breach, as by pleading and relying thereon.

Distinguished in Peterson v. Des Moines L. Ass'n, 115 Iowa 670-672, 87 N. W. 398, holding that although an application for membership in a mutual insurance company contains a stipulation on the part of the assured that all statements and answers written therein and those made to the medical examiner in the second application above referred to were warranted to be true, and to be full and fair answers to the question, yet under Sec. 1812 of the Code of 1897, where the company's medical examiner or physician acting as such under the rules and regulations of the company, reports the applicant to be a

fit subject for insurance, the company shall be thereby estopped from setting up in defense of the action on said policy * * * that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the same was procured through the fraud or deceit of the assured; and that this fraud or deceit must be practiced on the medical examiner, and does not include other fraud in procuring the policy: And holding further that the term "medical examiner" includes any physician who examines an applicant for insurance and makes the certificate of health on which the company acts in issuing the policy.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

4. Trial—Weight of Evidence for Jury.—The weight of the evidence and whether or not a question in issue is true, is for the jury to determine, pp. 232, 233.

Reaffirmed in Madden v. Saylor Coal Co., 133 Iowa 707, 111 N. W. 60.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

5. Trial—Evidence—Opinion of Expert Witness—Previous Contradictory Opinion.—Where an expert witness testifies as to matters of opinion, he may be impeached by showing that, upon a former occasion, he had expressed a different opinion, p. 237.

Reaffirmed and qualified in Seibert Bros. & Co. v. Germania F. Ins. Co., 132 Iowa 63, 106 N. W. 509, holding that a witness cannot be contradicted on an irrelevant or immaterial matter, statement or opinion.

SNYDER v. NELSON, 31 IOWA 238

1. Appeal—Verdict against Evidence—Conflicting Evidence—Affirmance.—Where the evidence upon a jury trial was conflicting and the trial court refuses to set aside the verdict as not supported by the evidence, the Supreme Court will not reverse the judgment for such cause, p. 239.

Reaffirmed and explained in Dove v. Independent Sch. Dist. of Keokuk, 41 Iowa 692, holding that the finding of facts by the trial court in an action at law tried by the court will be treated as the verdict of a jury upon appeal; and that in such case the judgment will not be reversed because the finding is not supported by the evidence, unless it is manifestly thereby unsupported.

(Note.—There are numerous cases, sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under *Shepherd v. Brinton* (15 Iowa 84), Vol. II, p. 308.

SCOFIELD *v.* MOORE, 31 IOWA 241

1. Judgment—Assignment of "Without Recourse," etc.—Effect—Liability of Assignee.—One who transfers "all right, title and interest in" a judgment "without recourse," does not thereby become a guarantor of the amount due thereon, pp. 243, 244.

Special cross reference. For cases citing the text, and many others, see annotations under Rule 1 of *Watson v. Chesire* (18 Iowa 202), Vol. II, p. 612.

WENDELING *v.* BESSER, 31 IOWA 248

1. Limitation of Actions—Open, Running Account—Boarding and Lodging.—An action on an open, continuous, current account is not barred under the Code of 1860, until five years after the date of the last item.

An account or claim for keeping, lodging and supporting a person is within the above rule, p. 250.

Reaffirmed as to first paragraph in *Tubbs v. City of Maquoketa*, 32 Iowa 565, 566.

Reaffirmed in *Carroll v. McCoy*, 40 Iowa 39, 40.

Reaffirmed in *Cedar County v. Sager*, 90 Iowa 14, 57 N. W. 635, under Sec. 2531 of the Code of 1873, corresponding to Sec. 2743 of the Code of 1860, the law of the text.

Reaffirmed and varied in *Higley & Co. v. B. C. R. & N. Ry. Co.*, 99 Iowa 506, 61 Am. Rep. 250, 68 N. W. 830, holding that an open account for items of money paid by reason of overcharges on freight by a railroad company, is within the rule of the text and the Code of 1873 corresponding thereto.

Reaffirmed and explained in *Miller v. Armstrong, Ex'r*, 123 Iowa 87, 98 N. W. 561, holding that an open, current account for board, nursing and attendance is within the rule and the Code of 1897 corresponding thereto.

PRESTON *v.* VAN GORDER, 31 IOWA 250

1. Tax Sale of Land—Lien for Prior Delinquent Taxes for Which it Is Not Sold Extinguished by.—Where land is sold for taxes for a certain year or years, all liens for prior or other delinquent taxes thereon are—under Sec. 763 of the Code of 1860—extinguished as against the purchaser at the tax sale, and the land cannot thereafter be sold therefor, pp. 253, 254.

Reaffirmed in *Bowman v. Thompson*, 36 Iowa 506; *Shoemaker v. Lacy*, 45 Iowa 424.

Reaffirmed in *Kessey v. Connell*, 68 Iowa 432, 433, 27 N. W. 365, 366, under Sec. 871 of the Code of 1873, corresponding to the section of the text.

Reaffirmed and explained in Shoemaker v. Lacey, 38 Iowa 278, holding that the county treasurer can only make one sale of real estate for all the delinquent taxes due thereon.

Reaffirmed and narrowed in Bowman v. Eckstein, 45 Iowa 585, holding that the rule does not apply in favor of the owner of the land who becomes purchaser at the tax sale nor to an assignee from him before the expiration of three years from the date of sale (the period for redemption), when prior delinquent taxes are omitted from the sale by mistake—But the contrary is held and the rule is reaffirmed in favor of the land owner, in Haugh v. Easley, 47 Iowa 332, where the prior delinquent taxes were not omitted by mistake.

Reaffirmed and narrowed in Crowell v. Merrill, 60 Iowa 54-56, 14 N. W. 81, holding that under 871 of the Code of 1873, corresponding to the section of the text, a sale of land for state and county taxes, does not prevent a later sale thereof for taxes voted in aid of the construction of a railroad.

Cited in Gardner v. Early, 69 Iowa 44, 28 N. W. 428, not in point, but involving another point on the question of a tax sale of land.

Distinguished in Dennison v. City of Keokuk, 45 Iowa 267-270, holding that a sale of land by the county treasurer for state and county taxes, does not affect the lien of a city for city taxes, and that it may thereafter be sold therefor: And holding that a sale of land for city taxes does not affect or extinguish the lien for taxes for prior years.

Distinguished in Soper v. Espeset, 63 Iowa 329-332, 19 N. W. 233, holding that where land is sold for taxes due for two or more years, and is purchased for a less sum than the amount due, as provided and allowed by Chap. 79, Acts of 1876, (16th General Assembly), the owner, in order to redeem therefrom, must pay the amount of taxes due at the time of the sale, together with penalties, interest and costs.

GANTZ v. CLARK, 31 IOWA 254

I. Appeal—Action at Law—Error to be Affirmatively Shown.
—Upon appeal to the Supreme Court in an action at law, error in the rulings of the trial court must be affirmatively shown from the record, p. 257.

Reaffirmed in First Nat'l Bk. of Dubuque v. Carpenter, Stibbs & Co., 41 Iowa 521.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

DUNLAP & Co. v. CODY, 31 IOWA 260, 7 AM. REP. 129

1. Fraud—Foreign Judgment—Action on in This State—Defenses—Fraud in Obtaining Jurisdiction by Foreign Court.—Where defendant is induced by false representations or fraud of the plaintiff or his attorney to go to a foreign state, and service of summons is then served on him, the judgment rendered thereon is void, and the defendant may set up such facts as a defense in an action on the foreign judgment in this state.

So where defendant is induced to go to the foreign state by the false representations of the plaintiff's attorneys that a particular contract of work was to be let, in his line of employment, and while there he was served with process in the plaintiff's action against him in such state, such facts constitute fraud and is a complete defense to an action in this state on the foreign judgment thereon rendered, 262, 263.

Reaffirmed in Toof, McGowen & Co., v. Foley, 87 Iowa 12, 54 N. W. 60.

Reaffirmed and extended in Whetstone v. Whetstone, 31 Iowa 281-283, holding further that where a judgment in another action between the same parties concerning the same subject-matter and in another court, whether foreign or domestic, is set up in bar of a later action, the plaintiff may prove by way of reply, that such former judgment was obtained by fraud of the party relying thereon.

Cited in Cowin v. Toole, 31 Iowa 516, the court holding that the judgment of any court may be attacked and set aside in a direct proceeding, for fraud in obtaining it.

Cited in Danforth v. Thompson, 34 Iowa 245, not in point.

Cited in Clark v. Little, 41 Iowa 500, the court holding that where a judgment rendered on a defective return of service of original notice, is sought to be enforced in another action, and the record in the first action does not show that the court decided upon its sufficiency thereon, the defense that the defendant was never legally served with notice and that the court rendering the judgment had no jurisdiction, is available in the last action.

Distinguished in Leiber v. U. P. R. Co., 49 Iowa 689; Mooney v. U. P. R. Co., 60 Iowa 350, 14 N. W. 345; Longueville v. May, 115 Iowa 712, 87 N. W. 432, cases wherein the facts do not bring them within the rule.

Distinguished in Mahoney v. State Ins. Co., 133 Iowa 576, 578, 579, 110 N. W. 1044, 9 L. R. A. (New Series), 490, holding that a judgment cannot be collaterally attacked for false testimony, or for false written evidence, produced upon the trial of the action wherein the judgment was rendered, when both parties are before the court: That a judgment cannot be collaterally attacked for fraud, unless the fraud be such as will render it absolutely void.

Cross references. See further on this question, annotations and cross references under *Pollard v. Baldwin* (22 Iowa 328), ante. p. 37.

2. Pleading—Demurrer—Failure to Amend or Standing on Demurrer after Adverse Ruling—Effect—Appeal—Practice.—Under Sec. 3088 of the Code of 1860, upon a decision on a demurrer, if the unsuccessful party fail to amend or plead over, the same consequences shall ensue as though a verdict had passed against the plaintiff, or the defendant had made default. And the unsuccessful party cannot upon such failure, standing on the demurrer, and appeal to the Supreme Court from the order overruling it, be allowed a reversal and to withdraw his demurrer and proceed to a trial on the merits, p. 268.

Reaffirmed in *Grimes v. Hamilton County*, 37 Iowa 299, 300.

MALLORY v. LUSCOMBE, 31 IOWA 269

1. Appeal—Equitable Action Tried Below by Second Method—Review.—Upon an appeal in an equitable action tried below according to the second method prescribed by Secs. 2999 and 3000 of the Code of 1860, the Supreme Court will review the cause as appeals in actions at law; and in such case the decision of the lower court upon the evidence will be treated upon the appeal as the verdict of a jury, p. 270.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under *Snowden v. Snowden* (23 Iowa 457) ante. p. 124.

WRIGHT & CO. v. HARRIS, 31 IOWA 272

1. Officers—County Judge—Liability of Sureties on Official Bond.—Under Chap. 119 of the Acts of 1862 (9th General Assembly) the sureties on the official bond of a county judge are liable for money collected by him from an executor, or another settling an estate, in satisfaction of a claim allowed, and which he (the county judge), fails to pay to the person entitled thereto, pp. 274-276.

Reaffirmed in *Doogan v. Elliott*, 43 Iowa 347, 348, holding that the rule is applicable whether the money is paid as belonging to an heir or legatee or a creditor; and that when it is so paid by an executor it amounts to a settlement without special order in reference thereto, and the executor is not liable therefor unless the settlement is later set aside, or impeached as for fraud.

Reaffirmed and varied in *Walters-Cates v. Wilkinson*, 92 Iowa 132, 133, 60 N. W. 516, holding that the sureties on the official bond of the district court clerk are liable for money paid to him by order of court to await the further order of the court, and which he later

fails to pay to the person adjudged entitled thereto, and to whom it is ordered paid.

2. Officers—Official Bond Signed in Blank—Later Filled in by Officer—Effect.—Where the sureties on an official bond sign it without blanks being filled, with the expectation that they would be later filled in, in a certain manner, they are bound by his action in so doing and the bond is valid when so filled, p. 276.

Reaffirmed and varied in Lee County v. Welsing, 70 Iowa 200-202, 30 N. W. 483, holding that when sureties sign different blank bonds of an officer, some signing one and some signing another, with the understanding that the officer is to fill in the bonds and do all things necessary to make the different papers his one official bond, it gives him the power to fill in one and cut off the signatures to the others and paste them to the one filled in; and that when so done all the sureties are liable thereon: And holding, as does the present case, that such authority may be conferred on the officer by parol.

WHETSTONE v. WHETSTONE, 31 IOWA 276

1. Fraud—Judgment Obtained by—Action on—Defense—Res Adjudicata.—Fraud in obtaining a judgment, or in obtaining the jurisdiction of the court to render it, as by fraudulently obtaining service of notice, is a complete defense to an action on the judgment.

So where a judgment in another action between the same parties concerning the same subject-matter and in another court, whether foreign or domestic, is set up in bar of a later action, the plaintiff may prove by way of reply, that such former judgment was obtained by fraud of the party relying thereon, pp. 281, 282.

Reaffirmed in Rush v. Rush, 46 Iowa 649, 650, 26 Am. Rep. 179; Beeman v. Kitzman, 124 Iowa 88, 99 N. W. 172, holding—as does the present case—that a decree of divorce may be set aside for fraud in obtaining it, where there has been no second marriage; and that in the action to set it aside the fact of a second marriage is a defense to be pleaded by the defendant therein, and need not be negatived by the plaintiff therein.

Reaffirmed and explained in Klaes v. Klaes, 103 Iowa 692, 72 N. W. 778, holding that a decree for alimony rendered upon false testimony as to the ownership of the property involved, will be set aside as fraudulent in an action therefor.

Reaffirmed and explained in Beeman v. Kitzman, 124 Iowa 88, 89, 99 N. W. 172, holding that a judgment or decree (in this case a decree of divorce), rendered by a court which has obtained no jurisdiction over the parties, or by a court whose jurisdiction is fraudulently invoked against a non-resident who fails or refuses to appear in the action, is void, and may be assailed directly or whenever its validity comes in question.

Reaffirmed and explained in Kwentsky v. Sirovy, 142 Iowa 392, 121 N. W. 30, holding that the general rule is that a judgment obtained by fraud, collusion or perjury inherent in the cause of action can not be attacked in a collateral proceeding; but that if the fraud or duress is practiced in the very act of obtaining or procuring the judgment, the judgment may be collaterally attacked: But the fraud or duress which will authorize the setting aside of a decree or judgment must be such as really prevented the unsuccessful party from having a trial.

Reaffirmed and varied in Cowin v. Toole, 31 Iowa 516, holding that a judgment of any court may be set aside for fraud, in a direct proceeding or action therefor.

Cited in Lyon v. Vannatta, 35 Iowa 527, the court holding that when there is such a defective original notice as to be equivalent to *no notice*, the judgment and all proceedings are void, whether assailed directly or collaterally: Holding, also, that such a notice is one which warns defendant to appear and answer at a time when the term of court is not in session and before it commences.

Cited in Clark v. Little, 41 Iowa 500, the court holding that where a judgment rendered on a defective return of service of original notice, is sought to be enforced in another action, and the record in the first action does not show that the court decided upon its sufficiency thereon, the defense that the defendant was never legally served with notice and that the court rendering the judgment had no jurisdiction, is available in the last action.

Cited in Spencer v. Burns, 114 Iowa 127, 128, 86 N. W. 210, the court holding that when defendant is served with notice by a copy being left at his usual place of residence with one *who is not a member of his family*, it amounts to *no notice*, a judgment by default entered thereon is void, and will be set aside upon defendant's motion without his complying with Sec. 3790 of the Code of 1897, with reference to setting aside defaults.

Distinguished in Wilson v. Wilson, 49 Iowa 545, 546, holding that in an action by a wife to set aside a decree of divorce, which is valid on its face, for fraud, no temporary alimony and money to prosecute the action, can be allowed—And to the same effect is *McFarland v. McFarland*, 51 Iowa 568, 2 N. W. 271, distinguishing the text, and holding this rule applicable to such an action where the decree is *voidable* and not *void*.

2. Divorce and Alimony—Action for by Wife—Prior Decree by Husband Obtained by Fraud—Temporary Alimony and Suit Money.—Where a wife sues her husband for divorce, and the husband pleads a prior decree of divorce, in another court, in bar of her action, whereupon the wife by way of reply, pleads that the prior decree was obtained by fraud, the wife is entitled to be allowed a

reasonable sum for temporary alimony and for expenses in prosecuting her action and having the issues determined, pp. 277, 281-284.

Reaffirmed and extended in Briggs v. Briggs, 36 Iowa 384, holding further that where a husband sues to set aside a decree of divorce and alimony and to obtain a new trial and to enjoin the collection of the alimony awarded, and the court thereupon restrains the collection of all except a certain sum of the alimony, this amounts to an allowance for temporary alimony and expenses of the suit and is proper.

Distinguished in Wilson v. Wilson, 49 Iowa 545, 546, holding that in an action by a wife to set aside a decree of divorce, which is valid on its face, for fraud, no temporary alimony and money to prosecute the action can be allowed—and to the same effect is McFarland v. McFarland, 51 Iowa 568, 2 N. W. 271, distinguishing the text, and holding this applicable to such an action where the decree is *voidable* and not *void*.

SIMMONS v. CHURCH, 31 IOWA 284

1. Judgment by Default—Naked Default—When May be Set Aside—Judicial Discretion of Trial Court—Abuse—Reversal.—Under Sec. 3150 of the Revision of 1860, a judgment by default may be only set aside on motion at the term at which it was rendered, a sufficient excuse therefor and a defense to the action being shown: But a naked default may be set aside at any time before judgment is entered thereon.

In determining the meritorious defense and excuse of the party moving to set aside a judgment by default, the trial court has a large judicial discretion which will not be disturbed upon appeal except for abuse thereof, pp. 286-288.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Harper v. Drake (14 Iowa 533), Vol. II, p. 281.

2. Vendor and Purchaser—Possession of Land Operates as Constructive Notice.—Possession of land by another than the vendor thereof, is notice to the purchaser of the rights or title of the former therein or thereto, p. 287.

Reaffirmed in Ague v. Seitsinger, 85 Iowa 311, 52 N. W. 230.

Reaffirmed and explained in Phillips v. Blair, 38 Iowa 656, holding that actual possession by a purchaser of real estate under a parol contract of purchase thereof, operates as constructive notice of his title or equity therein to subsequent purchasers and other persons dealing therewith adversely to him.

Cross reference. See further on this question, annotations under Dickey v. Lyon (19 Iowa 544), Vol. II, p. 763.

HUBBELL & BRO. v. REAM, 31 IOWA 289

1. Trial—Separation of Witnesses—Discretion of Trial Court.—Not only is it within the discretion of the court trying a cause to order a separation of witnesses, but such order, upon the application of either party, is rarely withheld, p. 291.

Special cross reference. For cases citing, sustaining and explaining the text, and others, see annotations under *Jemmison v. Gray* (29 Iowa 537), ante. p. 557.

2. Trial—Order of Introduction of Evidence—Judicial Discretion of Trial Court—Abuse—Reversal.—The examination of witnesses and the order of introducing testimony is within the large judicial discretion of the trial court—under Sec. 3046 of the Code of 1860—and his ruling thereon will not be ground for reversal, except in a clear case of abuse of such discretion and resulting prejudice to the substantial rights of the party appealing.

So, after the party adverse to the one on whom rests the burden of proof has produced his testimony, the other is confined to rebutting evidence, *unless the court, for good reasons, in furtherance of justice*, permits him to introduce evidence in chief, p. 295.

Reaffirmed in *Boals v. Shields*, 35 Iowa 233; *McNichols v. Wilson*, 42 Iowa 392; *Carman v. Roenan*, 45 Iowa 136; *Hess v. Wilcox*, 58 Iowa 383, 10 N. W. 848; *Meadows v. Hawkeye Ins. Co.*, 67 Iowa 59, 60, 24 N. W. 592.

Reaffirmed and explained in *State v. Thomas*, 135 Iowa 726, 109 N. W. 903; *State v. Rohn*, 140 Iowa 647, 119 N. W. 91, holding that the order of the introduction of evidence is a matter resting largely in the discretion of the trial court, and that the exercise of this discretion will not be interfered with on appeal, unless it is made to appear that the ruling was not in the furtherance of justice, and was prejudicial.

(Note.—There are numerous cases under the various codes, sustaining, but not citing the text.—Ed.)

CRANE v. CRANE, 31 IOWA 296

1. Descent and Distribution—Bastards—Written Recognition by Father, Nature of Required.—In order to allow a bastard to inherit from the putative father—under Sec. 2442 of the Code of 1860—where the latter recognizes the former as his son, in writing, the writing need not be a formal avowal executed for the purpose of declaring and perpetuating the fact, but may be shown by letters referring to the former as his child, pp. 302-304.

Reaffirmed in *Brown v. Iowa Legion of Honor*, 107 Iowa 442, 443, 446, 78 N. W. 74, 75; *Watson v. Richardson*, 110 Iowa 676, 80 N. W. 409, under the Sec. 3385 of the Code of 1897.

Cited in Van Horn v. Van Horn, 107 Iowa 249, 250, 45 L. R. A. 93, 77 N. W. 847, 848; Alston v. Alston, 114 Iowa 38, 86 N. W. 58, the court holding—as does the present case in argument—that when the putative father generally, openly or notoriously recognizes his illegitimate as his child, the latter inherits from the former under the statute of this State: And this although such recognition may have been in another state.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

RICHARDS v. BURDEN, 31 IOWA 305

1. Appeal—What Orders and Rulings May be Appealed from—Final Orders.—Under Sec. 2632 of the Code of 1860, an appeal to the Supreme Court may be taken from an order made affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, and from an intermediate order involving the merits and materially affecting the final decision.

Under Sec. 2634 of that Code the Supreme Court may, in its discretion, prescribe rules for allowing appeals on such other intermediate orders or decisions as they think expedient, and for permitting the same to be taken and tried during the progress of the trial in the court below; but such intermediate appeals must not retard proceedings in the trial in chief in the district court.

So under Sec. 2632 above an appeal does not lie from intermediate rulings of a referee or the trial court on the admission or rejection of evidence, pp. 307-310.

Reaffirmed as to first paragraph in Dryden v. Wyllis, 51 Iowa 535, 1 N. W. 703, under the Code of 1873.

Reaffirmed and explained in Jones v. Ch. & N. W. R. R. Co., 36 Iowa, 72, 73, holding that a party may except to an intermediate ruling or order from which the statute allows an appeal, proceed to trial and appeal from the final judgment, and have the decision on the intermediate order reviewed: That this applies to an order overruling a motion for a change of venue: And that except in respect to such intermediate orders and decisions from which the statute gives an appeal, none other of the rulings of the court can be reviewed, though excepted to, but on appeal from the final judgment; and this applies as well to the rulings by a referee as by the court; and the time within which the appeal must be taken dates necessarily from the final judgment.

Reaffirmed and explained in Specht v. Spangenberg, 70 Iowa 490, 491, 30 N. W. 876; Allen v. Church, 101 Iowa 118-121, 70 N. W. 128, holding that—under Sec. 3164 of the Code of 1873, corresponding to Sec. 2632 of the Code of 1860—an appeal does not lie from an

order sustaining or overruling a motion to strike out as irrelevant a part of a petition not designed to show a distinct cause of action.

Reaffirmed and explained in Price v. Aetna Ins. Co., 80 Iowa 411, 412, 45 N. W. 1054, holding that under Sec. 3164 of the Code of 1873, corresponding to Sec. 2632 of the Code of 1860, an appeal lies from an order transferring certain issues to equity and depriving a party to a jury trial thereon.

Reaffirmed and explained in Walker v. Pumphrey, 82 Iowa 491, 48 N. W. 929, holding that—under Sec. 3164 of the Code of 1873, corresponding to Sec. 2632 of the Code of 1860—appeals lie only from final judgments or orders and judgments affecting substantial rights and defeating a final judgment for a party; and that therefore an appeal does not lie from an order overruling a motion to strike an answer from the file and involving rulings of the court on matters of practice and other similar matters during the conduct of a cause and before the answer was filed.

Reaffirmed and explained in Allen v. City of Davenport, 115 Iowa 22-24, 87 N. W. 743, holding that an appeal lies under Sec. 4101 of the Code of 1897, corresponding to Sec. 2632 of the Code of 1860, from an order overruling a motion to strike an amendment to an answer filed in the court below after a judgment is reversed and the cause remanded.

Reaffirmed and explained in Hawarden State Bank v. Hessler, 131 Iowa 692, 109 N. W. 211, holding that under Sec. 4101 of the Code of 1897, corresponding to Sec. 2632 of the Code of 1860, no appeal lies from an order overruling a motion to require a garnishee to pay money into the hands of the clerk, when there are no affidavits filed in support of or proof introduced on the motion showing insolvency of the garnishee or that he would not safely keep and turn over the money when so ordered upon final judgment.

Reaffirmed and explained as to first paragraph in Burnham v. Thompson, 35 Iowa 422, 423, holding that an appeal lies from an order overruling a motion to set aside a verdict of a jury assessing damages for the condemnation of land taken for a mill dam and to quash the writ of *ad quod damnum*.

Reaffirmed and explained as to first paragraph in Allerton v. Eldridge, 56 Iowa 710-712, 10 N. W. 253, holding that under Sec. 3164 of the Code of 1873 corresponding to the section of the text, an appeal does not lie from an order granting or refusing to grant a change of venue; but that if such order is excepted to at the time, it may be reviewed upon a later appeal from an intermediate order or ruling from which an appeal is allowed or upon appeal from a final judgment: And holding, also, that an appeal is allowed under such section from an order dissolving specific and general attachments.

Reaffirmed and explained as to first paragraph in Scott v. Union County, 63 Iowa 585, 19 N. W. 667, holding that when a ruling on a demurrer to a petition grants the plaintiff all the relief he demands, he cannot appeal from the order sustaining the demurrer as to certain paragraphs of his pleading.

Reaffirmed and explained as to last paragraph in Baldwin v. Mayne, 40 Iowa 687 (abstract), holding that an appeal does not lie from an intermediate order suppressing depositions because they were taken from the clerk's office by attorney for plaintiff contrary to Sec. 3739 of the Code of 1873.

Reaffirmed as to last paragraph in Garmoe v. Sturgeon, 67 Iowa 701, 25 N. W. 887; State v. Arns, 72 Iowa 556, 34 N. W. 329, under Secs. 3163, 3164 of the Code of 1873.

Cited in Stephenson v. Cook, 64 Iowa 268, 20 N. W. 183, on the competency of husband or wife as a witness for or against the other, a question involved, but not determined in the present case.

FRIEDLANDER v. MAHONEY, SHERIFF, 31 IOWA, 311

1. Exemptions—Life Insurance Policies—Property Derived From Sale or Transfer of.—Although policies of life insurance may not be subject to sale under execution, yet property for which they are assigned or transferred, is subject thereto, unless otherwise exempt, pp. 314, 315.

Reaffirmed and extended in Harris v. Fassett, 56 Iowa 265, 9 N. W. 217, holding that the proceeds of a voluntary sale of exempt personal property, is not exempt.

Reaffirmed and extended in Kinzer v. Stephens, 121 Iowa 348, 349, 96 N. W. 859, holding further that the interest of an heir in the proceeds of a homestead, sold by the heirs after the death of the widow who survived her husband who died seized thereof, is subject to the satisfaction of a debt of such heir.

And see 152 Iowa 420, not yet published.

STATE v. MOFFITT, 31 IOWA 316

1. Appeal in Criminal Case—Verdict not Supported by Sufficient Evidence—Circumstantial Evidence—Reversal.—Upon an appeal in a criminal case the Supreme Court will more readily reverse because the verdict is not supported by sufficient evidence than in a civil action; and where in such case the evidence is circumstantial and is insufficient, consisting largely of matters of suspicion, to support a verdict of guilty, a reversal will follow, pp. 318, 319.

Special cross reference. For cases citing and sustaining the text and others, see annotations under Rule 2 of State v. Johnson (19 Iowa 230), Vol. II, p. 719; State v. Tomlinson (11 Iowa 401), Vol. I, p. 833.

BYRNE v. ROBERTS, 31 IOWA 319

1. Actions—Service of Notice by Publication—Sufficiency of Proof to Authorize Order for.—Under Chap. 240, Acts of 1856, (6th General Assembly) an affidavit as to the non-residence of the defendant and the return of the sheriff on the original notice that the defendant is "not found," constitutes sufficient proof that the defendant is a non-resident and cannot be found within the state, on which to base an order for service of notice by publication, pp. 320, 321.

Special cross reference. For cases citing and distinguishing the text, and many others on this question, see annotations under *Abell v. Cross* (17 Iowa 171), Vol. II, p. 511.

MAPLE v. NELSON, 31 IOWA 322

1. Judicial or Execution Sale of Land—Purchase by Judgment Creditor or His Assignee for Less than Two-Thirds of Appraised Value—Sale Invalid.—Where the judgment creditor or the assignee of the judgment purchases land sold under execution for less than two-thirds of its appraised value, the sale and deed made thereunder are invalid, pp. 324-326.

Reaffirmed and explained in *Brown v. Butters*, 40 Iowa 545, 546, holding that if the property of the judgment debtor is sold on execution, for less than two-thirds of the appraised value thereof, at the time of the sale, exclusive of all liens, mortgages or incumbrances thereon, the sale will be void.

2. Trust Contrary to Absolute Deed—Parol Evidence to Establish—Sufficiency of.—Where it is sought to establish a trust to land by parol evidence in favor of a party and contrary to a deed absolute on its face, the proof thereof should be clear, satisfactory and conclusive, p. 327.

Special cross reference. For cases citing, sustaining and qualifying the text, and many others on this question, see annotations under Rule 2 of *Cooper v. Skeel* (14 Iowa 578), Vol. II, p. 288.

HUGHES v. LINDSEY, 31 IOWA 329

1. Lands—Parol Gift of—Statute of Frauds.—A parol gift of land, followed by possession under it, the payment of taxes and the making of permanent improvements thereon, is not within the Statute of Frauds (Sec. 4008 of the Code of 1860). And where a father makes a gift of land to his son and the latter takes possession thereof, pays the taxes and makes permanent improvements thereon, the title of the son thereto will be quieted as against the other heirs of the father, pp. 331-333.

Cited in Wickham v. Henthorn, 91 Iowa 244, 59 N. W. 277; Walkley v. Clarke, 107 Iowa 453, 78 N. W. 71, the court holding that the taking and holding of possession of land under a contract of purchase and with the consent of the vendor, takes the transaction out of the Statute of Frauds (Code of 1873).

Cited in Ague v. Seitsinger, 85 Iowa 310, 52 N. W. 230, the court holding that where a county accepts the grant of an easement or highway, and under the conditions of the grant, enters into possession thereof, partially performs the conditions, and continuously uses it for thirty years, the grantor, or his heirs, grantees or privies cannot thereafter question the validity of the grant, or raise the question of the Statute of Frauds as to it.

Distinguished in Trout v. Trout, 44 Iowa 475, a case wherein the evidence did not make the rule applicable.

Distinguished and narrowed in McMahill v. McMahill, 69 Iowa 117, 118, 28 N. W. 471, holding that where a father agrees to convey to his son certain land as an advancement and puts the son in possession thereof, the latter pays the taxes thereon and makes permanent improvements thereon, but after the father's death takes equally with the other heirs, he (the son) cannot sue in equity and obtain a conveyance of the land from the other heirs.

(Note.—There are many cases under the various codes, sustaining, but not citing the text.—Ed.)

CALLANAN v. BROWN & Co., 31 IOWA 333

1. Personal Property—What Included In Term—Bonds of a City.—Under Sec. 29 of the Code of 1860, the term "personal property" includes money, goods, chattels, evidences of debt and things in action: And bonds issued by a city to raise money for improvements, are personal property, pp. 337, 338.

Reaffirmed and extended in Nordyke v. Carlton, 108 Iowa 417, 79 N. W. 137, holding that a promissory note is subject to levy under an attachment—under the Code of 1873—by the sheriff taking manual possession thereof: And that such an attachment and levy in this state is superior to a subsequent garnishment of the debt evidenced by the note, in another state.

2. Sales of Personal Property—Warranty—What Constitutes.—In order to constitute a warranty in the sale of personal property the word "warrant" need not be used. Any distinct assertion or affirmation of quality made by the seller during a negotiation for a sale of chattels, which it may be supposed was intended to effectuate the sale, and was operative in effecting it, will constitute a warranty, p. 338.

Reaffirmed in Jack & Toner v. D. M. & Ft. D. R. R. Co., 53 Iowa 402, 5 N. W. 539; Latham v. Shipley, 86 Iowa 546, 547, 53 N. W. 343.

Reaffirmed and explained in Figge v. Hill, 61 Iowa 432, 16 N. W. 340, holding that the question whether there has been a warranty or not depends upon the intention and understanding of the parties, as collected from their acts and expressions at the time of sale; and when the contract is not wholly in writing, is one of the facts for the jury, under the instructions of the court.

Reaffirmed and explained in Eagle Iron Works v. Des Moines Suburban Ry. Co., 101 Iowa 295, 296, 70 N. W. 195, holding that a warranty may be both in executed and executory sales of personal property, the warranty attaching in the latter upon the delivery of the property.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

Cross references. See further on this question, annotations under Tewkesbury v. Bennett (31 Iowa 83), ante. p. 651, Hughes v. Funston & Smith (23 Iowa 257), ante. p. 101.

3. Sales of Personal Property—Breach of Warranty—Measure of Damages.—In an action for breach of warranty in the sale of personal property, the measure of damages is the difference between the market value at the time of the sale if it had been as warranted, and its actual value at such time in its defective or unsound condition, pp. 340, 341.

Reaffirmed in Douglass & Hemingway v. Moses, 89 Iowa 43, 48 Am. St. Rep. 353, 56 N. W. 272, and see 153 N. W. 277, 133 N. W. 710.

4. Conversion—Commercial or Negotiable Paper, Conversion of—Measure of Damages.—While the measure of damages for the wrongful conversion of negotiable paper is *prima facie* the sum recoverable thereon, yet the real market value may be shown by showing the insolvency of the maker or obligor, and the measure of damages will then not exceed such real or market value, p. 341.

Reaffirmed in Pelley v. Walker, 79 Iowa 147, 44 N. W. 348; Sickles v. Dallas Center Bank, 81 Iowa 413, 46 N. W. 1091.

Reaffirmed and varied in Strickler v. Oldenburgh, 39 Iowa 654, holding that when a verbal will bequeathes notes to the value on their face of four hundred dollars, the face or nominal value will be taken as the true value in the absence of evidence showing insolvency of the makers or the like; and that when the true value thereof is less than three hundred dollars, the Will will be refused probate because it is not in writing.

Cross reference. See further in this connection, annotations under Rule 2 of Latham v. Brown (16 Iowa 118), Vol. II, p. 414.

WOODWARD v. RODGERS, 31 IOWA 342

1. Bills and Notes—Negotiable Notes—Fraud in Inception as Defense to Action by Holder—Burden of Proof.—When the defense to an action on a negotiable note is fraud in its inception, and such defense is supported by evidence, the *onus probandi* is thereby cast upon the holder, who brings the action, to show that he gave value for it, and that he is a *bona fide* purchaser before maturity, p. 343.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Rule 2 of Lane v. Krekle (22 Iowa 399), ante. p. 46.

HALE v. WALKER, 31 IOWA 344, 7 AM. REP. 137

1. Private Corporations—National Banks—Liability of Stockholder—Holder of Stock as Collateral—When Liable as Stockholder.—Where one takes a transfer of shares of stock in a National Bank as collateral security for a debt, and the stock is transferred on the books of the bank and he thereby appears as owner, he is liable as a stockholder to the creditors of the corporation (bank) to the amount of the value of the shares at par value as provided by the National Banking Act, pp. 352-354.

Reaffirmed and varied in Calumet Paper Co., v. Stotts Inv. Co., 96 Iowa 151-153, 59 Am. St. Rep. 362, 64 N. W. 783, holding that where stock in a corporation is issued to another corporation, but is only held by it as collateral security, it is nevertheless liable—under Sec. 1082 of the Code of 1873—to the creditors of the corporation issuing the stock to the amount of the unpaid price thereof.

Distinguished in Cormac v. Western White Bronze Co., 77 Iowa 34, 41 N. W. 481, the facts not bringing the case within the rule.

Distinguished and impliedly overruled in Tierney, Trustee, v. Ledden, 143 Iowa 289-292, 21 Am. & Eng. Ann. Cas., 105, 121 N. W. 1051, holding that under Secs. 1626, 1627 and 1631 of the Code of 1897, the holder of stock in a corporation, as collateral security, is not liable as a stockholder.

2. Fraud—Pleading—How Fraud to be Pleaded.—In order to admit evidence of fraud there should, under our system of pleadings, be at least a general statement of the facts constituting the fraud, p. 355.

Reaffirmed and explained in Toovey v. Ayrhart, 136 Iowa 699, 114 N. W. 183, holding that fraud cannot be pleaded in general terms, but the facts relied upon must be stated, and a pleading containing nothing more than the mere allegation that the transaction is fraudulent, when fraud is a fact relied upon by the pleader, is subject to demurrer.

Distinguished in Ruby v. Schee, 51 Iowa 425, 1 N. W. 744, the case turning on other questions.

(Note.—There are other cases sustaining but not citing the text.—Ed.)

CITY OF BURLINGTON v. GILBERT, 31 IOWA 356, 7 AM. REP. 143

1. Estoppel—Municipal Corporations—Improvement of Streets—Estoppel of Abutting Lot Owners.—Where the charter of a city provides that “the city council shall have power to cause to be opened, paved, repaved, or improved, any street, lane, alley, market place or public landing, on petition of not less than two-thirds of the number of owners of any square of said city, bounding or abutting on such street,” and owners of lots abutting on a street petition the council to so improve the street, they cannot after the improvements are made evade payment of their assessments therefor because the petition was signed by less than two-thirds of the abutting lot owners.

An innocent mistake of the city in reference to the grade or grade line described in such petition and the doing of the work in reference thereto will not entitle the petitioning abutting lot owners to damages for injuries resulting to their lots, pp. 365-368.

Reaffirmed and explained in Preston v. City of Cedar Rapids, 95 Iowa 78-83, 63 N. W. 579, holding that when abutting lot owners petition the city to improve a street and the grade is not described in the petition, the city has the right to make the improvements according to the *established grade*, and such lot owners cannot claim damages for injuries to their property resulting from grading and making such improvements.

Reaffirmed and explained in Clifton Land Co., v. City of Des Moines, 144 Iowa 627-629, 123 N. W. 341, holding that where a city constructs a sidewalk at the instance of an abutting lot owner who knows the work is proceeding and makes no objection thereto, the latter cannot later claim that the proceedings in reference thereto are void.

Cited with approval in Shelby v. City of Burlington, 125 Iowa 353, 101 N. W. 105, the case turning on another question.

Cited in Thompson v. Mitchell, 133 Iowa 529-530, 110 N. W. 902, the court holding that where a land owner pays several installments for different years of a special tax for a ditch, he cannot thereafter enjoin the collection of the rest of the tax on the ground that it is illegal, or that the proceedings were void.

Cited in Carroll County v. Cuthbertson, 136 Iowa 462, 114 N. W. 18, the court holding that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted: But before the principle may be applied

it must be made to appear in some way that the party in whose favor it is sought to be applied has been led to do something he would not otherwise have done.

Distinguished in Richman v. Brd. of Supervisors of Muscatine County, 70 Iowa 630, 631, 26 N. W. 26, holding that before the county board of supervisors may construct a levee the petition prescribed by Sec. 1208 of the Code of 1873, must be signed by a majority of the resident adjacent land owners: And holding that when such an owner signs the petition and later signs a remonstrance, he is to be treated as a remonstrator and not a petitioner.

Unreported citation, 131 N. W. 779.

CARLIN v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co., 31 IOWA 370

(Later appeal 37 Iowa 316.)

1. Appeal—Instructions Contradictory or Misleading, Reversible Error—Instructions Given to Jury by Mistake.—Where instructions given by the trial court are contradictory, conflicting or misleading, the judgment will be reversed unless it be affirmatively shown from the record that no prejudice resulted therefrom.

So where an instruction not given and which is in conflict with another given is handed by mistake to the jury and taken by them to their room and kept by them during their deliberations with the ones given, it will be ground for reversal, unless the record shows that no prejudice resulted therefrom, p. 372.

Cited in Ford v. C. R. I. & P. Ry. Co., 106 Iowa 90, 75 N. W. 652, the court holding that the fact that conflicting instructions were given to the jury will always be ground for reversal except where the record shows that no prejudice resulted therefrom.

DEWEY v. CHICAGO & NORTHWESTERN R. R. Co., 31 IOWA 373

1. Railroads—Liability for Killing or Injuring Stock—Duty to Repair Fences.—It is the duty of railroad companies to fence their roads; and if they fail to do so they are absolutely liable for stock injured, in the absence of the willful act of the owner. It is, also, their duty to maintain and keep up the fences after they are made; and for a failure to do this they would be likewise liable. But before the liability would attach in the latter case, in the absence of wrong on their part, they must have knowledge that the fence is out of repair, and a reasonable time thereafter to put it in repair.

But after the company has knowledge that the fence is down, which knowledge may be shown by direct proof or by the lapse of such time as would afford a reasonable presumption of it, it must use proper diligence in putting it up, and, for neglect in this regard, would be liable, as for omitting to build a fence, p. 376.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under *Aylesworth v. Ch. R. I. & P. R. R. Co.*, (30 Iowa 459), ante. p. 623.

2. Negligence—Action by Administrator of Decedent Conductor of a Railroad Train—Contributory Negligence—Burden of Proof.—In an action by an administrator for the death of his decedent alleged to have been caused by the negligence of the defendant, the plaintiff must prove not only the negligence of the defendant but that the decedent did not by his own negligence proximately contribute, in whole or in part, to the accident which caused his (decedent's) death.

This rule applies to an action by an administrator of a conductor killed in operating a train: And where, in this case, the proof shows that the conductor could have so managed or controlled the train as to have avoided the accident, the plaintiff (administrator) cannot recover, p. 376.

Reaffirmed in *Lane, Administrator, v. Cent. Iowa Ry. Co.*, 69 Iowa 445, 446, 29 N. W. 421.

Cited in *York, Adm'r, v. Ch. M. & St. P. Ry. Co.*, 98 Iowa 551, 67 N. W. 576, the case turning on other questions.

And see 153 Iowa 430, 133 N. W. 676, not yet published.

Special cross reference. For further cases citing and sustaining the text, and others on the question, see annotation under *Greenleaf, Adm'r, v. Ill Cent. R. R. Co.* (29 Iowa 14), ante. p. 489.

3. New Trial—Duty of Trial Court in Granting or Refusing—Appeal from Order Refusing—Affirmance, When.—The trial or district or circuit court ought to grant a new trial whenever his superior and more comprehensive judgment teaches him that the verdict of the jury fails to grant substantial justice to the parties. But while the greatest freedom on the part of *nisi prius* judges should be exercised in setting aside verdicts, in order to secure and effectuate justice, yet judges ought to use caution in the exercise of the power so as not to invade the legitimate province of the jury when they have manifested a fair and intelligent consideration of the evidence submitted to them, nor to injuriously protract litigation in pursuit of invariable and absolute justice in every case.

Where the evidence below was conflicting and the trial court has overruled the motion for new trial based on the ground that the verdict was not supported by sufficient evidence, the Supreme Court will not reverse for such a cause, pp. 377, 378.

Reaffirmed in *Johnson v. C. R. I. & P. R. R. Co.*, 58 Iowa 350, 12 N. W. 331; *Kern v. May*, 92 Iowa 676, 61 N. W. 391.

Reaffirmed as to second paragraph in *Stutsman v. B. & S. W. R. R. Co.*, 53 Iowa 760 (abstract), 6 N. W. 64.

Reaffirmed and explained in Holland v. Kelly, 149 Iowa 393, 126 N. W. 169, holding that an order granting a new trial will not be reversed upon appeal unless it affirmatively appears that the trial court abused its judicial discretion; and that this is especially true where the motion is sustained generally upon numerous grounds, on the merits of some or all of which the trial court is in better position to pass than is the Supreme Court upon appeal.

Reaffirmed and qualified in Brooks v. Brotherhood of American Yeoman, 115 Iowa 588, 589, 88 N. W. 1090, holding that where the trial court grants a new trial because the verdict was not supported by sufficient evidence, the Supreme Court will reverse the order, only when the record shows a clear case of abuse of the trial court's judicial discretion.

Cited in Howell v. Snyder, 39 Iowa 611, the court holding that it requires a stronger showing of abuse of discretion of the trial court to authorize a reversal upon appeal from an order granting a new trial because the verdict was contrary to the evidence, than upon an appeal refusing to grant a new trial for such cause.

Cited in Royer v. King's Crown Plaster Co., 147 Iowa 278, 125 N. W. 186, a case wherein the trial court granted a new trial for error in instructions, and his ruling was affirmed upon appeal from the order.

Unreported citation 128 N. W. 339, 135 N. W. 364.

Cross reference. See further on this question, annotations under Shepherd v. Brenton (15 Iowa 84), Vol. II, p. 308.

GLIDDEN v. HIGBEE, 31 IOWA 379

1. Pleading—Action on Contract—Defense That Contract Void or Voidable—Pleading in Justice's Court.—Under Sec. 2942 of the Code of 1860, any defense showing that a contract, written or oral, or any instrument sued on is void or voidable, etc., must be specially pleaded.

And this rule applies to an action in a justice's court where the pleadings are in writing, pp. 380, 381.

Reaffirmed as to first paragraph in Shawyer v. Chamberlain, 113 Iowa 744, 86 Am. St. Rep. 411, 84 N. W. 662, under Sec. 3629 of the Code of 1897.

2. Pleading—Justice's Court—Written Pleadings in—Rule as to.—While technical nicety of pleading and exact correspondence of proof are not required in a justice's court, even where the pleadings are in writing; still, under Sec. 3872 of the Code of 1860, where they are in writing in such court, they are required to be *substantially* the same as in the district court, p. 381.

Reaffirmed in C. & N. W. Ry. Co. v. Weaver, 112 Iowa 102, 83 N. W. 795, under the Code of 1897.

REICHARD v. WARREN COUNTY, 31 IOWA 381

1. Counties—Public Buildings—Authority of Board of Supervisors—Vote of People for—Void Contract—Rights of Contractor—Use of Building, Erected under Void Contract, Not Ratification—Duty of Persons Dealing with Municipal Officers.—Under the Act of March 22, 1860, (8th General Assembly), the board of supervisors cannot order the erection of a court house, jail, poor house or other building, or a bridge, nor purchase real estate for county purposes, when the probable cost will exceed five thousand dollars (\$5,000) until a proposition therefor and the tax requisite therefor is first submitted to a vote of the people. Any act of such board or other county officers in excess of the authority conferred by such a vote is void *ab initio*.

Where a contractor renders additional labor and adds to a public building by contract with the board of supervisors and in excess of the authority conferred on it by such a vote, he (the contractor) cannot recover for any sum for such additional labor or addition to the building. And the use of such a building by the county, when it is completed does not ratify the illegal and void transaction.

Persons dealing with municipal officers acting under delegated or statutory powers are bound, at their peril, to know that the power being exercised is with authority, pp. 387-390, 392.

Reaffirmed and explained in Nat'l State Bank of Mt. Pleasant v. Independent District of Marshall, 39 Iowa 495, 496, holding that Art. 3 Sec. 3 of the Constitution of 1857, limiting the indebtedness of municipal corporations, applies to school districts; and that an order drawn by a school district for an indebtedness in excess of such limitation is not negotiable, although it be payable to bearer and negotiable in form, and is void even in the hands of an innocent holder.

Reaffirmed, explained and varied in Iowa R. R. L. Co. v. Sac County 39 Iowa 149, holding that where a proposition to levy an additional tax to pay off the indebtedness of a county, failed to submit for *what year* it was to be levied, that, upon its carrying, the board of supervisors of the county had no authority to levy it as of a particular year; and the election is of no effect: That where a power is conferred by law, and the manner of its exercise is also prescribed, the power can only be exercised in the prescribed mode.

Reaffirmed and varied as to second paragraph in Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa 253, 254, 91 N. W. 1088, holding that a contract or grant made by a municipal corporation without any authority of law, and accepted by the grantee with full knowledge of its unlawful character, cannot be held to give a color of right to the privilege thus attempted to be granted.

Distinguished in Stevenson and Rice v. Dist. Township of Summit, 35 Iowa 468, holding that when the board of directors of a school

district has power to contract for the erection of a school house, it may ratify such contract made by a sub-director.

Distinguished in Hawk v. Marion County, 48 Iowa 474, 475, holding that, under Secs. 279, 303 and 796 of the Code of 1873, the county board of supervisors has implied power to offer a reward for the recovery of money stolen from the county, and that the county is liable to the person earning the reward; but such board has no power under such sections to offer a reward for the arrest and conviction of a person stealing the county's money or property.

Distinguished in Austin v. Dist. Township of Colony, 51 Iowa 103-105, holding that in an action on an order of a district township, it will be presumed, in the absence of proof to the contrary by defendant (the township), that it was issued for a lawful indebtedness.

Unreported citation. 120 N. W. 642.

Special cross reference. For further cases citing and sustaining the text, and many others, see annotations under Clark v. City of Des Moines (19 Iowa 199), Vol. II, p. 715.

Cross references. See further on this question, annotations under Starr & Rand v. Bd. of Supervisors of Des Moines County (22 Iowa 491), ante. p. 60; Webster County v. Taylor (19 Iowa 117), Vol. II, p. 703; Hull & Argalls v. Marshall County (12 Iowa 142), Vol. II, p. 29.

STATE v. THOMPSON, 31 IOWA 393

1. Murder—Murder in the First Degree—Indictment for—Necessary Averments—Murder in the Second Degree.—Under Sec. 4192 of the Code of 1860, an indictment for murder in the first degree where the deceased was not killed by means of poison, or by accused lying in wait, or in the perpetration or attempt to perpetrate arson, rape, robbery, mayhem, or burglary, must charge that the killing was done with malice aforethought and willfully, deliberately and premeditately; and the indictment must allege an intent to kill by accused, and that the killing was so done, and with malice aforethought, willfully, deliberately and premeditately; but if such indictment fails to so aver when these averments are so required, it is good as an indictment for murder in the second degree, p. 394.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under State v. McCormick (27 Iowa 402), ante. p. 416.

LAKE v. CRUIKSHANK, 31 IOWA 395

1. Promissory Note—Action on—Evidence—Genuineness of Signature—Burden of Proof—Forgery.—Although Chap. 28, Acts of 1862 (9th General Assembly), a substitute for section 2967 of the Code of 1860, provides that in an action on a promissory note, the

signature of the person sought to be bound thereon shall be deemed genuine unless denied by him in his answer under oath, yet this does not preclude such defendant from pleading as a defense in an unverified answer and proving thereunder that he never signed the paper *as a note*, but that he signed it as a receipt or other similar paper, and that it was later fraudulently altered without his consent to read as sued on, p. 396.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Rule 2 of *Loomis & Leroy v. Metcalf and Fuller* (30 Iowa 382), ante. p. 609; *Hall v. Ætna Mfg. Co.* (30 Iowa 215), ante. p. 587.

MELHOP & KINGMAN *v.* DOANE & CO., 31 IOWA 397, 7 AM. REP. 147
(Later Appeal, 36 Iowa 630.)

1. Actions—Judgments in Personam and In Rem—Jurisdiction of Courts—Foreign Judgments—Faith and Credit Given Here.—In personal actions, if the court has jurisdiction of the subject-matter and of the parties, by the service of notice of its pendency, its judgment is binding and conclusive, while it remains unreversed, however erroneous. It is indispensable to the effectiveness of such a judgment that the court had jurisdiction of the subject-matter and of the parties. If the jurisdiction fail as to either, the judgment is a mere nullity.

Service of notice by publication, or by personal service outside of the state, upon a person who is not a resident or citizen of this state, confers no jurisdiction, either as to the person or the property of such non-resident, on a court of this state; but when a court of this state has, by its process of attachment or otherwise, seized or acquired jurisdiction *in rem* over property of a non-resident, it may perfect its jurisdiction as to the adjudication of the subject-matter, by means of such kinds of service. This applies to a foreign judgment when sued on in this state.

A judgment of another state, where the jurisdiction properly appears upon the record, is entitled to the same faith and credit in this state as it is entitled to in the state where rendered.

So an unsatisfied judgment rendered in another state, whether property is attached or not, where the defendant is at the time a resident of this state and has not been served with notice of the pendency of the action within the foreign jurisdiction, and has made no appearance to the action, has no binding force or effect upon the defendant *in personam*, so that an action can be maintained thereon in this state to recover the amount of the judgment: But to the extent of the property seized and sold in the attachment proceedings in satisfaction of the judgment therein, the defendant in such proceedings is concluded from recovering the value thereof in an action in this State

against the plaintiff in the foreign judgment, unless in a proper case he can show that it was procured through fraud, pp. 399-403, 407.

Reaffirmed in Dohns v. Mann, 76 Iowa 727, 39 N. W. 825, an action to foreclose a mortgage on an infant's land, wherein the return of the officer showed neither actual or constructive service of notice on him, or a substitute therefor, and no defense was made for him by his guardian, the court holding the judgment to be void, under such circumstances, both upon direct and collateral attack.

Reaffirmed in part in Danforth v. Thompson, 34 Iowa 246, holding that a foreign judgment cannot be avoided for want of jurisdiction when the record shows that the parties appeared and tried the cause on its merits, and the laws of the foreign state gave the court jurisdiction over the subject-matter.

Reaffirmed in part in Wilson v. Hathaway, 42 Iowa 176, holding that the General Assembly may provide for notice by publication in a proceeding to condemn land for a county road, and that this notice gives the court jurisdiction of the property involved.

Reaffirmed and explained in part in Kelly v. Norwich Fire Ins. Co., 82 Iowa 140, 47 N. W. 987, holding that a court can acquire no jurisdiction *in personam* by process served beyond the territorial limits of its jurisdiction upon a defendant who is not a resident therein, and that a judgment rendered thereon, is void *ab initio*.

Cited in Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa 600, 82 Am. St. Rep. 529, 82 N. W. 1026, the court holding that when by the laws, usages and practice of a state, a judgment rendered therein is valid, the same faith and credit will be extended to it here, and it will be enforced by the courts of this state; that when a foreign judgment is sued on in this State which is invalid by the laws hereof, proof of its validity as above where rendered is necessary to its enforcement by a court of this state.

Distinguished in Darrah v. Watson, 36 Iowa 120, 121, holding that when a court of a foreign state has jurisdiction of the subject-matter of an action and the defendant is personally served while he is temporarily in the state (Note, without being induced to enter the state by the fraud of the plaintiff or his attorneys.—Ed.), the judgment rendered thereon is valid.

Cross references. See further on this question, annotations and cross references under Rule 2 of Hakes v. Shupe (27 Iowa 465), ante. p. 423. See also, in this connection, annotations under Crafts, Adm'r, v. Clark (31 Iowa 77), ante. p. 650.

2. Pleading—Demurrer to Petition—Plaintiff Amending after Demurrer Sustained Waives Error.—Where a demurrer to a petition is sustained and the plaintiff does not stand on the demurrer, but amends his petition to conform to the ruling of the court, he thereby waives error, if any, in such ruling, p. 399.

Reaffirmed in Scholl v. Bradstreet Co., 85 Iowa 553, 39 Am. St. Rep. 311, 52 N. W. 501.

(Note.—There are numerous cases sustaining, but not citing the text, and applying the rule to all pleadings, where the party pleads over after a ruling on demurrer.—Ed.)

CHAMBERLAIN v. ROBERTSON, 31 IOWA 408

1. Statute of Frauds—Verbal Sale of Land—Possession or Part Payment of Purchase Price—Effect.—Where a purchaser of land under a verbal contract of sale and conveyance, pays part of the purchase money to the vendor or his agent, or takes possession of the land under the contract with the consent of the vendor or his agent, the transaction is not within the Statute of Frauds (Secs. 4006-4008 of the Code of 1860), pp. 412, 413.

Reaffirmed and explained in Ague v. Seitsinger, 85 Iowa 309, 310, holding that where a county accepts the grant of an easement or highway, under the conditions of the grant enters into possession thereof, partially performs the conditions, and continuously uses it for thirty years, the grantor, or his heirs, grantees or privies cannot thereafter question the validity of the grant, or raise the question of the Statute of Frauds as to it.

Distinguished in Heddleston v. Stoner, 128 Iowa 526, 105 N. W. 57, a case wherein partial payment of the purchase price was held not proven, and the possession by the purchaser was held under the facts, to be *as tenant* of the vendor and not under the claimed verbal contract of sale, and the transaction was therefore held to be within the Statute of Frauds: The court holding that one who goes into possession simply of the real estate of another is presumed to be a tenant, in the absence of any proof to rebut such presumption.

Unreported citation, 135 N. W. 1093.

(Note.—There are numerous cases under the various codes sustaining, but not citing the text.—Ed.)

2. Lands—Vendor and Purchaser—Wife as Purchaser—Vendor Cannot Repudiate for Her Coverture.—Where a married woman becomes a purchaser of land under a contract for a conveyance, and pays part of the purchase price thereof, the vendor cannot avoid the contract or evade specific performance in equity because of the coverture of the purchaser, pp. 413, 414.

Cited in Epperly v. Ferguson, 118 Iowa 50, 91 N. W. 817; Lutschager v. Fank, 151 Iowa 62, the case involving the ratification by a wife of a contract of her husband to convey homestead.

Unreported citation, 130 N. W. 173.

BERRY v. BERRY, 31 IOWA 415

1. Gifts—Personal Property—When Irrevocable—Gift Upon Conditions—Compliance with Conditions by Donee Necessary.—When a gift of personal property is made upon certain conditions to be performed by the donee, compliance therewith by the donee is necessary before the gift becomes valid and irrevocable, pp. 417, 418.

Reaffirmed in Cunningham v. Hurd, 109 Iowa 37, 38, 79 N. W. 386.

2. New Trial—Juror Drinking Intoxicants after Retirement for Final Deliberation.—The drinking of intoxicating liquor by one of the jurors after the jury retire for final deliberation, is a ground for a new trial, p. 419.

Special cross reference. For cases citing, sustaining, qualifying and narrowing the text, and many others on this question, see annotations under Rule 3 of State v. Baldy (17 Iowa 39), Vol. II, p. 487.

DOUGLASS v. DOUGLASS, 31 IOWA 421

1. Divorce—Desertion by Husband of Wife Without Reasonable Cause—Subsequent Insanity of Husband—Effect.—Where a husband willfully deserts his wife without reasonable excuse or fault on her part and is absent for two years, he cannot defeat the wife's cause of action for divorce given by Sec. 2534 of the Code of 1860, because during the period of the two years he became insane and was prevented thereby from returning to her, pp. 422, 424.

Distinguished in Wertz v. Wertz, 43 Iowa 536, 537, holding that insanity of a husband or wife is not a ground for divorce, nor is cruel or inhuman treatment by either while so insane a ground for divorce under our statute (Code of 1873).

Distinguished in Mohler v. Shank, 93 Iowa 277-280, 57 Am. St. Rep. 274, 34 L. R. A. 161, 61 N. W. 983, holding that a guardian of an insane man cannot maintain an action for his divorce from his wife; and that a decree therefor in such an action is *void ab initio*.

LOOMIS v. MCKENZIE, 31 IOWA 425

1. Partnership—Ill Feeling and Differences Between Partners—When Does not Authorize Appointment of Receiver.—Ill feeling existing between partners and differences between them, will not authorize the appointment of a receiver to take charge of the partnership property and operate the business during the pendency of an action to dissolve the partnership, in the absence of a showing that injury or loss will result if a receiver is not appointed, p. 427.

Reaffirmed and varied in Wallace v. Pierce-Wallace Pub. Co., 101 Iowa 331, 332, 63 Am. St. Rep. 389, 38 L. R. A. 122, 70 N. W. 220, holding that a receiver will not be appointed for a stock company because of ill feeling or differences between two of the stockholders, in the absence of facts showing that loss or injury will result to the other stockholders or creditors of the company if a receiver is not appointed.

FRENCH v. GIFFORD, 31 IOWA 428

1. Actions—Receiver—Compensation—How Paid—When and When Not Paid from Funds in His Hands.—When there is no question made as to the legality or propriety of the appointment of a receiver and he acts thereunder, his compensation is to be paid out of the funds coming into his hands.

But where the legality or propriety of the appointment of a receiver is questioned, and his appointment is set aside upon appeal, the court should apportion the costs and compensation of that officer between the parties under Sec. 3449 of the Code of 1860, pp. 430, 431.

Reaffirmed as to first paragraph in Redford v. Folsom, 55 Iowa 287, 7 N. W. 610; Jaffray & Co. v. Roab, 72 Iowa 337, 338, 33 N. W. 338; Harrington v. Foley, 108 Iowa 295, 79 N. W. 66; Frick, Adm'r v. Fritz, 124 Iowa 532, 533, 100 N. W. 514.

(Note.—There are many other cases sustaining, but not citing the first paragraph of the text.—Ed.)

STATE, *ex rel.* BUELL v. CITY OF LYONS, 31 IOWA 432

1. Quo Warranto—When Lies—Testing Validity of City Ordinance or Illegal or Irregular Exercise of Municipal Powers by, Not Allowed.—*Quo Warranto* lies, under Sec. 3732 of the Code of 1860, to test the right or claim to an office, franchise or power which may have been theretofore, with or without color of right unlawfully exercised; and in case of adverse claimants to award the office or franchise to him having the legal right thereto.

But *Quo Warranto* does not lie to test the validity of an act done in an improper, illegal or irregular manner by city officers where power is at all conferred on them. So the writ does not lie to annul a city ordinance vacating a street when the power to vacate streets is conferred by charter, pp. 433-435.

Reaffirmed in State v. Nebraska Telephone Co., 127 Iowa 197, 103 N. W. 121.

Reaffirmed and qualified in School Township of Franklin v. Wiggins, 122 Iowa 608-610, 98 N. W. 492, 493, holding that injunction lies upon complaint of a tax payer of an independent school district to test the validity of the organization thereof and the acts of its of-

ficers and to restrain them from further acting, upon the plaintiff, taxpayer, alleging and proving his special interest and damage or injury.

Cited in Spitzer v. Runyan, mayor, and City Council of Vinton, 113 Iowa 622, 85 N. W. 783, the court holding that except for want of authority or for fraud, courts will not inquire into or interfere with the exercise of lawful municipal authority.

DICKERMAN v. DAY, 31 IOWA 444, 7 AM. REP. 156

1. Usury — Discount of Accommodation Paper — Innocent Holder.—The defense of usury is not available against the accommodation maker of a promissory note, by a purchaser in good faith from the payee at a greater discount than legal interest, taken without any knowledge of the character of the paper, p. 451.

Reaffirmed in Wolf v. Smith, 36 Iowa 456.

Reaffirmed and explained in Lay v. Wissman, 36 Iowa, 307, 309, holding that in an action on a negotiable note equities existing between the maker and the payee cannot be set up against the indorsee in the ordinary course of business, for a valuable consideration, in good faith, and before maturity; and that this is the rule although the indorsee paid less than the face value of the note; and that in such last case the indorsee may recover of the maker the face value of the note, with interest.

Cross reference. See in this connection, annotations under Burroughs & Prettyman v. Cook & Sargent (17 Iowa 436), Vol. II, p. 555.

KNIGHT v. KNIGHT, 31 IOWA 451

1. Divorce—Cruel and Inhuman Treatment by Husband as Ground—Sufficiency of—Wife Causing—Effect.—The cruel and inhuman treatment by the husband of his wife in order to entitle her to a divorce, must be such as to furnish her reasonable grounds to apprehend physical danger or danger to her life in continuing the cohabitation.

Where the cruelty or inhuman treatment of the husband is caused by the fault of the wife, as by her misconduct, ill temper and the like, it is no ground for divorce, pp. 456-458.

Reaffirmed in Evans v. Evans, 82 Iowa 464, 48 N. W. 810; Owen v. Owen, 90 Iowa 366-368, 57 N. W. 888; Carlisle v. Carlisle, 99 Iowa 249, 250, 68 N. W. 682; Prather v. Prather, 99 Iowa 395, 68 N. W. 807; Olson v. Olson, 130 Iowa 355, 106 N. W. 759.

Reaffirmed and explained in Wheeler v. Wheeler, 53 Iowa 514, 515, 36 Am. Rep. 240, 5 N. W. 691, holding that any course of con-

duct on the part of the husband which has the effect of impairing the wife's health is legal cruelty under the statute—and the wife does not have to wait until bodily harm has been done, but may proceed to institute her action for divorce as soon as such danger be reasonably apprehended—and holding that the fact that a wife and her daughter associates with members of a family over the objection of the husband, when no reason for his objecting is shown, is not such fault as will defeat her right of action for divorce for cruel and inhuman treatment.

Reaffirmed and explained as to first paragraph in Aitchison v. Aitchison, 99 Iowa 104, 107, 68 N. W. 577, holding that treatment by the husband which is calculated to affect the mind of his wife so as to destroy her health and ultimately endanger her life, or which involves, by natural consequences, a permanently injurious and prejudicial effect upon her health, perilous to life, is sufficient to constitute a ground for divorce.

Cross reference. See further on this question, annotations under Freerking v. Freerking (19 Iowa 34), Vol. II, p. 687; Beebe v. Beebe (10 Iowa 133), Vol. I, p. 659.

BOWEN v. TROY PORTABLE MILL CO., 31 IOWA 460

1. New Trial at Law Decreed in Equity—When.—Equity will grant a new trial in an action at law where the power of the court of law to so do has ceased, the judgment cannot be corrected on appeal, and the applicant therefor states sufficient reasons why the motion was not made in the court of law in the proper time, and sets out equitable circumstances entitling him to relief, and a defense to the action at law, p. 463.

Reaffirmed in Dist. Township of Newton v. White, 42 Iowa 613; Bond v. Epley, 48 Iowa 605; Larson v. Williams & Betenbender, 100 Iowa 117, 62 Am. St. Rep. 544, 69 N. W. 442.

Reaffirmed and explained in Young v. Tucker, 39 Iowa 600, holding that equity will set aside a judgment at law which was procured by fraud, where the relief cannot be granted by appeal and the defrauded party is otherwise without redress.

Cited in State Ins. Co., v. Granger, 62 Iowa 276, 17 N. W. 506, not in point, but on a parity.

Distinguished in Benby v. Fie and Cain, 106 Iowa 302, 76 N. W. 703, holding that equity will not entertain a bill to modify a decree because of a change of law after its entry.

Distinguished in Mains v. Des Moines Nat'l Bank, 113 Iowa 400-402, 85 N. W. 760, holding that the rule is inapplicable where the defendant in an action at law had full opportunity to set up his defense therein before judgment, but failed to do so.

Distinguished in Hawley v. Griffin, 121 Iowa 693, 694, 97 N. W. 87, holding that the rule will not be applied to enable a plaintiff to set up and litigate a new cause of action, nor for defendant to set up a counterclaim or cross demand.

Cross reference. See further on this question, annotations under Partridge & Co. v. Harrow (27 Iowa 96), ante. p. 371; Hoskins v. Hattenback (14 Iowa 314), Vol. II, p. 243.

WARREN v. DAVENPORT FIRE INSURANCE CO., 31 IOWA 464, 7 AM. REP. 160

1. Fire Insurance—Insurable Interest, What Is—Stock in Corporation Insurable Interest in Corporate Property.—Any interest either legal or equitable in property is a sufficient "insurable interest" to sustain a policy of fire insurance.

So the owner of stock in a private corporation may insure the corporate property against loss by fire, pp. 467-470.

Reaffirmed and explained in Merritt v. Farmers' Insurance Co., 42 Iowa 13, 14, holding that if the holder of an interest in property will suffer loss by its destruction he may indemnify himself therefrom by a contract of insurance: That the interest must be of such a character that the destruction of the property will have a direct effect upon it, not a remote or consequential effect; but if, by the loss, the holder of the interest is deprived of the possession, enjoyment or profits of the property, or of the security or lien resting thereon, or other certain benefits growing out of, or depending upon it, he holds an insurable interest.

Reaffirmed and explained in Reynolds v. Iowa & Neb. Ins. Co., 80 Iowa 566, 567, 46 N. W. 660, holding that the right to occupy a house as a homestead, is an insurable interest.

Reaffirmed and explained in Mahoney v. State Ins. Co., 133 Iowa 579, 9 L. R. A. (New Series), 490, 110 N. W. 1044, holding, as does the present case in argument, that a mortgagee of property has an insurable interest therein.

Cited in Keokuk Electric Ry. & Power Co., v. Weissman, Ex'r, 146 Iowa 688, 126 N. W. 64, not in point.

Cross reference. See further on this question, annotations under Rule 1 of Carter v. Humbolt Fire Ins. Co., (12 Iowa 287), Vol. II, p. 48.

KAUFFMAN v. HARSTOCK, 31 IOWA 472

1. Statute of Frauds—Oral Contract to Hold Harmless or Assume Obligation of Another—Parol Evidence.—An oral contract to hold another harmless or to assume the legal contractual obligation of another upon the happening of certain contingencies or condi-

tions, is with in the Statute of Frauds (Secs. 4006 and 4007 of the Code of 1860), and cannot be proven by parol evidence, p. 474.

Reaffirmed and explained in Walker & Davis v. Irwin, 94 Iowa 453, 62 N. W. 787, holding that a parol promise to pay the debt hands at any time that he desires, it is not within the Statute of Frauds.

Distinguished in Merchant v. O'Rourke, 111 Iowa 353-355, 82 N. W. 759, holding that where one induces another to buy stock in a corporation under an oral agreement to take it off of the buyer's hands at any time that he desires, it is not within the Statute of Frauds.

Unreported citations. 132 N. W. 33; 135 N. W. 612.

EASON v. GESTER, 31 IOWA 475

1. Appeal—Necessity of Exceptions Below—Chap. 49, Acts of 1866, Dispensing with Motion for New Trial, Construed.—Under Sec. 3106 of the Code of 1860, exceptions to the rulings and decisions of the trial court, must be taken at the time they are made or they will not be reviewed or be cause for reversal upon appeal. Chap. 49, Acts of 1866 (11th General Assembly), dispensing with a motion for new trial, does not abrogate this rule, pp. 475, 476.

Reaffirmed in Barnes v. Century Sav. Bk., 147 Iowa 269, 126 N. W. 175; Gould, Adm'x v. Morrow, treasurer, 153 Iowa 467, 133 N. W. 724.

Reaffirmed and explained in Ellis v. Leonard, 107 Iowa 490, 78 N. W. 247, holding that Sec. 3169 of the Code of 1873, expressly provides that the Supreme Court, on appeal, may review and reverse any judgment or order of the Superior or District Court although no motion for a new trial was made in such court; but that this presupposes an exception properly taken below.

Distinguished in Gullihier v. C. R. I. & P. R. R. Co., 59 Iowa 419, 13 N. W. 430, holding that where a party makes a motion for a new trial within the time allowed therefor by statute and excepts to the order overruling the motion, it is a sufficient exception to the judgment based on the verdict.

Unreported citation, 134 N. W. 738.

(Note.—There are numerous cases under the various codes sustaining, but not citing the text.—Ed.)

LESTER & BRO. v. SALLACK, 31 IOWA 477

1. Appeal—Verdict Against Evidence—Reversal for, When.—Although the Supreme Court will cautiously and reluctantly reverse a judgment because the verdict was against the evidence, yet it will do so where the verdict is clearly so and to allow it to stand would work injustice to appellant, p. 478.

Reaffirmed in Sadler v. Bean, 38 Iowa 685 (abstract); McCarthy v. C. R. I. & P. Ry. Co., 83 Iowa 491, 50 N. W. 23.

(Note—There are many cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of McKay v. Thorington (15 Iowa 25), Vol. II, p. 298.

ORDWAY v. SUCHARD & GEBHARD, 31 IOWA 481

1. Default—Motion to Set Aside—Discretion of Trial Court—Abuse—Reversal—Negligence of Party Moving to Set Aside or His Attorney.—The trial court has a large judicial discretion in acting on a motion to set aside a default, and his ruling thereon will not be cause for reversal except in case of abuse of such discretion.

A default judgment will never be set aside when it is the result of the negligence of the party moving therefor or of his attorney.

But where a party moves to set aside a default and shows a good defense to the action, that he intended to make defense thereto, but was prevented by accident or mistake, and that immediately upon learning of the entry of the default moved to set it aside at the same term at which it was entered, the order of the trial court overruling the motion to set aside the default, will be reversed upon appeal, pp. 487, 488.

Reaffirmed and explained in Jean v. Hennessey, 74 Iowa 350, 7 Am. St. Rep. 486, 37 N. W. 772, holding that an application to set aside a default is addressed to the sound judicial discretion of the trial court; and a mistake even though it relate to a matter concerning which the party is charged by law with notice, may afford sufficient ground of excuse; and so may an assurance by the judge as to the course which will be pursued in the cause, even though unauthorized, if it has in good faith been acted on by the party.

Reaffirmed and explained in Ellis & Ellis v. Butler, 78 Iowa 636, 43 N. W. 461, holding that where defendant's attorney prepared an answer containing a meritorious defense, and pending a motion to transfer the action to equity went to another town a short distance away on important business where he was unavoidably detained until after the motion was passed on and the default entered, furnished sufficient excuse for setting it aside.

Reaffirmed and explained in Browning v. Gosnell, 91 Iowa 449, 451, 59 N. W. 351, holding that when the copy of the original notice served on a defendant residing in a county other than that wherein the action was pending, warned him to appear and make defense on the 25th day of January, and on or before that date the defendant and his attorney went to the county wherein the action was pending for the purpose of making defense and found that the term of court

had commenced on the 5th day of January and that court had adjourned *sine die*, that these facts constituted sufficient cause for setting aside the default upon petition of the defendant.

Reaffirmed and explained in Church v. Lacy & Co., 102 Iowa 239-241, 71 N. W. 339, holding that the fact that an attorney for defendant forgot or overlooked making defense, or neglected to call his partner's attention to the case so that he would do so, was not sufficient cause for setting aside a default.

Reaffirmed and explained in Peterson v. Kock, 110 Iowa 21-23, 80 Am. St. Rep. 261, 81 N. W. 161, holding that the failure of a party's counsel to defend when employed to so do and when his negligence cannot be imputed to the client, is an unavoidable casualty and misfortune authorizing the setting aside a default or the granting of a new trial.

Reaffirmed and explained in Barto v. Sioux City Electric Co. and Iowa Telephone Co., 119 Iowa 185, 93 N. W. 270, holding that when an attorney for defendant misunderstands or mistakes the nature or scope of his employment, whereby he fails to defend when employed so to do, it is a sufficient cause for setting aside a default upon a good defense being shown.

Reaffirmed and explained in Klepper v. City of Keokuk, 126 Iowa 595, 102 N. W. 516, holding—as does the present case—that when an attorney failed to file an answer because the papers in the case got misplaced, it is a sufficient excuse to authorize the trial court setting aside the default.

(Note.—There are many cases sustaining, but not citing the text. The application of the rule being subject to the facts of each case no additional cases or Cross references are given.—Ed.)

JUDD v. HATCH, ADM'R 31 IOWA 491

1. Injunction—When Writ Not to be Dissolved on Answer Without Proof—Burden of Proof.—Where the defendant in his answer in an injunction action admits all the facts and allegations in the petition, but seeks to avoid by alleging affirmative matter as a defense, the writ should not be dissolved without the defendant proves his affirmative defense, pp. 492, 493.

Reaffirmed in Huskins v. McElroy, 62 Iowa 509, 17 N. W. 671; Hayes v. Billings, 69 Iowa 388, 28 N. W. 652.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

STATE FOR USE, ETC. v. SMITH, 31 IOWA 493

1. Municipal Corporations—Powers of—Taxation.—A municipal corporation can exercise no power of taxation unless it be ex-

pressly conferred by the legislature, or be absolutely necessary in order to carry out some other power expressly conferred, p. 495.

Reaffirmed and explained in Logan & Sons v. Pyne, 43 Iowa 525, 22 Am. Rep. 261, holding that municipal powers depend upon express grant, or must be necessarily implied as incident to other powers expressly granted, or indispensable to the object and purpose for which the corporations were created.

Reaffirmed and explained in City of Ottumwa v. Zekind, 95 Iowa 626, 58 Am. St. Rep. 447, 29 L. R. A. 734, 64 N. W. 647, holding that the power to tax is one of the highest attributes of sovereignty, and, if delegated by the Legislature to the municipality, such delegation must be in express terms, or by necessary implication, and cannot be implied from such general authority of power as "to license and regulate."

Reaffirmed and extended in City of Cherokee v. Perkins, 118 Iowa 406, 92 N. W. 69; City of Waukon v. Fisk, 124 Iowa 469, 470, 100 N. W. 477, holding further that the rule is equally applicable to a power granted to a city to license.

Cross reference. See further on this question, annotations and cross references under Clark, Dodge & Co. v. City of Davenport (14 Iowa 494), Vol. II, p. 272.

2. Municipal Powers—Statutes Conferring—Construction.—

Any doubt or ambiguity arising out of terms used in a statute granting municipal powers must be resolved in favor of the public, p. 496.

Reaffirmed in Logan & Sons v. Pyne, 43 Iowa 525, 22 Am. Rep. 261; City of Cherokee v. Perkins, 118 Iowa 406, 92 N. W. 69.

Reaffirmed and varied in Howard v. Emmet County, 140 Iowa 531, 118 N. W. 883, holding that the power to levy and collect a special assessment for drainage purposes is a special power, conferred for a special purpose, and that statutes conferring such power will be strictly construed.

Cross reference. See further on this question, annotations under Rule 2 of City of Burlington v. Kellar, (18 Iowa 59), Vol. II, p. 585.

JONES v. CLARK, 31 IOWA 497

(Former Appeal, 28 Iowa 493. Later Appeals, 34 Iowa 590; 37 Iowa 587.)

1. Appeal—Equity Cause—Reversal—Amendment after Cause Remanded.—Where upon appeal in an equity action the Supreme Court decides that appellant is the owner of personal property involved in the action, and the cause is remanded, the appellant is entitled to then amend his pleading claiming that the adverse party has converted the property and asking judgment for the value thereof, p. 499.

Reaffirmed and explained Sexton v. Henderson, 47 Iowa 133; Sankey, trustee, v. Iowa City Glass Co., 68 Iowa 547, 548, 27 N. W. 749; Leach v. Germania Bldg. Ass'n, 102 Iowa 126, 127, 70 N. W. 1090, holding that when for matters arising subsequent to the decree or when on account of the acts of a party pending the proceeding or subsequent to the decree, which could not have been considered in the trial and issues raised thereon, the relief should have been modified, amended pleadings may be filed in the court below upon the cause being remanded.

Reaffirmed and extended in Gray v. Regan, 37 Iowa 691, holding further that when a judgment is reversed because the finding of facts of the referee and judgment based thereon in favor of defendant was not authorized because of insufficient denials in the answer, the defendant may, upon the cause being remanded, amend his pleading to make the denials sufficient.

Cited in White v. Farlie, 67 Iowa 629, 630, 25 N. W. 837, the court holding that upon an appeal in an equity cause, the Supreme Court may reverse and remand in a proper case and for the purpose of effectuating justice.

Distinguished in Allen v. City of Davenport, 115 Iowa 25, 26, 87 N. W. 744, 745, holding that a party cannot after a judgment is reversed and the cause remanded, file a supplemental petition setting up a counterclaim in the nature of a new and distinct cause of action which arose after the final submission of the original controversy.

JOHNSON v. TANTLINGER, 31 IOWA 500

1. Conveyance of Land—Parol Reservation of Growing Crops.—Whether a parol reservation of growing crops at the time of the sale and conveyance of the land can be shown in a controversy between the grantor and grantee respecting them, is not decided, p. 502.

Special cross reference. For cases citing the text, and others, see annotations under Van Driel v. Rosierz (26 Iowa 575), ante. p. 365.

CRANE v. ELLIS, 31 IOWA 510

1. Trial—Practice—Order of Introduction of Evidence—Discretion of Trial Court—Abuse—Reversal.—The examination of witnesses and the order of introducing testimony is within the large judicial discretion of the trial court—under Sec. 3046 of the Code of 1860—and his ruling thereon will not be ground for reversal, except in a clear case of abuse of such discretion and resulting prejudice to the substantial rights of the party appealing.

So after the party adverse to the one on whom rests the burden of proof has produced his testimony, the other is confined to rebutting

evidence, *unless the court, for good reasons, in furtherance of justice*, permits him to introduce evidence in chief, p. 511.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under *Hubbell & Bro. v. Ream* (31 Iowa 289), ante. p. 675.

COWIN v. TOOLE, 31 IOWA 513

1. Equity—Judgment Obtained by Fraud—Action to Set Aside.—An action in equity is maintainable to set aside a judgment obtained by fraud of the successful party, p. 516.

Reaffirmed and explained in *Kwentsky v. Sirovy*, 142 Iowa 392, 121 N. W. 30, holding that the general rule is that a judgment obtained by fraud, collusion or perjury, inherent in the cause of action cannot be attacked in a collateral proceeding; but if the fraud or duress is practiced in the very act of obtaining or procuring the judgment, the judgment may be collaterally attacked: That fraud or duress which will authorize the setting aside of a decree or judgment must be such as really prevented the unsuccessful party from having a trial.

Distinguished in *Lang v. Dunn*, 145 Iowa 365, 124 N. W. 193, holding that a judgment on a contract cannot be attacked or set aside for fraud in obtaining the contract.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

2. Administrator's Sale of Land—Fraud in—Action to Set Aside Sale—Limitation of Actions.—An action in equity by an heir of a decedent to set aside a sale of land by an administrator for fraud, is not barred until five years after the discovery of the fraud by the plaintiff (heir), under Sec. 2740 of the Code of 1860, pp. 517, 518.

Reaffirmed and varied in *Baird v. Omaha & C. B. R. & B. Co.*, 111 Iowa 630, 631, 82 N. W. 1021, holding that an action to recover taxes under a mistake of fact may be maintained (under Sec. 3448 of the Code of 1897, Sec. 2530 of the Code of 1873), if commenced within five years from the discovery of the mistake by the plaintiff (party aggrieved).

Cited in *Jenkins v. Shields*, 36 Iowa 531, the court holding that an action may be maintained in the district court by the party aggrieved against an administrator and the sureties on his bond, for non-feasance and malfeasance; and that if in such case the administrator in fact and without fraud or mistake, made a final settlement and was discharged, this is a matter to be pleaded as a defense.

STATE v. COOK, 31 IOWA 519

1. Bastardy Proceedings—Jurisdiction of Circuit Court.—Under Chap. 58, Code of 1860, Chap. 86, Acts of 1868 (12th General

Assembly) and Chap. 153, Acts of 1870 (13th General Assembly) the circuit court has exclusive jurisdiction of bastardy proceedings, pp. 519, 520.

Reaffirmed in Montgomery County v. German, 34 Iowa 443, 11 Am. Rep. 152.

MILLER v. WARE, 31 IOWA 524

1. Conveyance—Recording—Constructive Notice—Innocent Purchasers.—A purchaser of land without actual notice is constructively notified of a prior mortgage only to the extent of that instrument as recorded and indexed, p. 526.

Reaffirmed in Forest Milling Co., et al. v. Cedar Falls Mill Co., 103 Iowa 641, 72 N. W. 1083; Lindberg v. Thomas, 137 Iowa 55, 114 N. W. 564.

Reaffirmed and explained in Disque v. Wright, 49 Iowa 541, holding that in cases of constructive notice the true state of the title must be imparted by the record itself, and not by facts *aliunde*; and that where a mortgage of land does not state the name of the mortgagee, or where the description in the index entry is so vague as to the lands mortgaged as to not, on its face, suggest or stimulate further inquiry into the record by a subsequent purchaser, or incumbrancer, it will not constitute constructive notice.

Reaffirmed and qualified in Shoemaker v. Smith, 80 Iowa 661, 662, 45 N. W. 746, holding that a purchaser who has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that which is about to purchase, and has neither inquired nor ascertained the extent of such title, has been guilty of a degree of negligence that is fatal to his claim to be considered a *bona fide* purchaser; and that knowledge or notice of facts acquired by an attorney or agent, when engaged properly in the business of his client or principal, becomes in law the knowledge or notice of such fact to the client or principal.

WOODWARD v. WALLING, 31 IOWA 533

1. Wills — Devise upon Condition with Devise Over upon Breach—Limitation upon Estate Devised—Construction of Wills.—If in a devise a condition is annexed to an estate thereby created, upon the breach or non-performance of which the estate is devised over to another, the condition operates as a limitation upon the estate of the first devisee which, upon the breach or non-performance of the condition, determines, without entry of the second devisee, who becomes seized and has an immediate right to the estate.

When there is no limitation over, in a devise upon a condition, raising an estate in another upon its breach, the condition or proviso

is not always construed as a limitation whereby the first estate devised may be defeated.

As the intention of the testator must be followed, the estate devised upon condition will be defeated or upheld after the condition broken, as such intention may be discovered in the language and construction of the will.

A limitation whereby an estate devised is to be determined, must be clearly expressed in the will.

So where a testator provided in his will that "I give and bequeath to my son E. J. (describing the lands devised), during his natural life, and after his decease to revert to his heirs, provided, however, that the said E. J. shall provide a home for his sister, O. Z., till her marriage, and then to give her an outfit equal to what her sisters have received at their marriage, provided, however, that if the said E. J. does not accept of the provisions of this will within eighteen months from the date of this, then said property to revert to his sister, O. Z.;" if E. J., the devisee, breaks the first condition thereip, his sister, O. Z., has only a trust in or charge upon the devised property to the extent of her rights under the will, but if E. J. breaks the last condition and fails to accept the will within the time prescribed, his estate is determined, pp. 534-538.

Reaffirmed in Mohn v. Mohn, 148 Iowa 297-298, 301, 302, 126 N. W. 1132, under different, but similar language in a will.

MILLER v. LARAWAY, 31 IOWA 538

1. **Change of Venue in Civil Action—Rule as to.**—When a party to a *civil action* moves for a change of venue and complies with Sec. 13, Chap. 167, Acts of 1870, (13th General Assembly)—a substitute for Sec. 2803 of the Code of 1860—he is entitled to the change as a *matter of right*, unless the record discloses facts showing that the application is made for delay, or for the purpose of harassing or hindering the adverse party, pp. 539, 540.

Reaffirmed in Moorman v. Moorman, 39 Iowa 461.

Reaffirmed and narrowed in Jones v. Ch. N. W. R. R. Co., 36 Iowa 70, holding that in the case set out in the text the party is entitled to the change, unless there be something apparent of record which under some other provision of the statute, would permit the court to refuse it.

Cited in State v. Harris, 40 Iowa 96, turning on another point.

REA v. FLATHERS, ADM'R, 31 IOWA 545

1. **Pleading—Demurrer—Pleading Over after Ruling on—Waiver of Error.**—Where a party pleads over after a ruling on demurrer, he thereby waives error, if any, in such ruling, p. 546.

Reaffirmed in Benedict v. Hunt, 32 Iowa 29; Philips v. Hosford, 35 Iowa 594 (abstract).

Reaffirmed and varied in Stineman v. Beath, 36 Iowa 79, holding that error, if any, in the court's overruling a motion to strike out the verification to a petition and to make the petition more specific, is waived by the defendant later filing a demurrer to the pleading.

Reaffirmed and varied in Shugart & Lininger v. Pattee, 37 Iowa 424, holding that error, if any, in overruling a motion to strike a supplemental petition from the files, is waived by the defendant thereafter filing an answer thereto and going to trial on the merits.

Cited with approval in Cleary v. Iowa Midland R. R. Co., 37 Iowa 350, the case turning on another point.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

2. Contracts—Quantum Meruit.—Where one preforms services for another at his request, or with his consent, without any agreement or understanding as to wages or remuneration, the law implies a promise to pay the reasonable value of the services, and the same may be recovered under a *quantum meruit*, p. 546.

Reaffirmed and explained in Wyman v. Passmore, 146 Iowa 489, 125 N. W. 214, holding that where parties attempt to contract for a compensation to be paid for services rendered, and the contract is found too indefinite to support a recovery or is otherwise void for uncertainty—the person rendering the services is entitled to recover their reasonable value: And holding therefore that where one of several children undertakes to keep the parent at the request of the others, those at whose request the service is performed are under obligation to make reasonable compensation.

Reaffirmed and qualified in Ogden v. Keerl, Adm'r, 152 Iowa 107, 108, 131 N. W. 682, holding however, that where one who is a member of the family of another and lives with him as such, contracts to perform services for the latter, the burden is on the former to prove that they were performed under an agreement or understanding that they were to be paid for.

KRIDER, ADM'R v. TRUSTEES OF WESTERN COLLEGE, 31 IOWA 547

1. Municipal and Other Public Corporations—Statutory Inhibition upon Sale of Realty—Power to Mortgage.—A statutory inhibition upon the power of a public or *quasi* public corporation to sell or alienate, does not prevent it from executing a valid mortgage, p. 552.

Cited in Fuller & Co. v. Hunt, 48 Iowa 166, not in point.

Cross reference. See further on this question, annotations under Rule 1 of Middleton Sav. Bk. v. City of Dubuque (15 Iowa 391), Vol. II, p. 356.

DAVEY v. BURLINGTON, C. R. & M. R. R. Co., 31 IOWA 553

1. **Ad Quod Damnum Proceedings—Appeals in—Jurisdiction of Courts.**—The district and circuit courts have concurrent jurisdiction—under the Code of 1860—of appeals in *ad quod damnum* proceedings. Chap. 153, Acts of 1870 (13th General Assembly) does not abrogate this rule, p. 555.

Reaffirmed in City of Ottumwa v. Derks, 32 Iowa 508.

BROWN v. BRYAN, 31 IOWA 556

1. **Actions—Practice—Intervention by Party Having Interest in Subject-Matter of Controversy—When Allowed.**—A party who is a necessary party to an action but who is not joined as such may—under the Code of 1860,—intervene in the action and claim his interest or title in the subject-matter, and ask and obtain the relief to which he would have been entitled had he been made a party, p. 558.

Reaffirmed and explained in Goetzman v. Whitaker, 81 Iowa 530, 531, 46 N. W. 1059, holding that the intervention of such a party may be allowed by the court at any stage of the action, if it does not delay the trial or prejudice the substantial rights of the parties thereto.

MAZOUCK v. IOWA NORTHERN R. R. Co., 31 IOWA 559

1. **Husband and Wife—Wife's Personal Property in Possession of Husband—When Subject to Husband's Debts—Joint Possession—Presumption.**—Where a wife suffers her personal property to pass into the possession and under the control of her husband without filing with the recorder of deeds the notice of her ownership as provided by statute (Code of 1860), it is liable to be taken in execution for the claim of one who gave credit to the husband while it was in his possession and who had no notice of the wife's title thereto.

Personal property in the common use and joint possession of husband and wife is *prima facie* controlled and owned by the husband, and is subject to his debts to third persons who have no notice that it is in fact owned by the wife, p. 561.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Smith v. Hewitt (13 Iowa 94), Vol. II, p. 123.

BURDICK v. BABCOCK, 31 IOWA 562

1. **Schools—Power of Board of Directors to Make Rules Regulating Conduct and Attendance of Pupils and to Expel for Violation of.**—The board of directors of an independent school district has the power to make a rule providing for the suspension from school of a pupil who is absent a given time or number of times, for other reasons than sickness, provided the rule be reasonable, 565-567.

Special cross reference. For cases citing the text, and others see annotations under *Murphy v. Brd. of Directors of Indep. Dist., of Marengo* (30 Iowa 429), ante. p. 617.

Cross reference. See further on this question, annotations under *Clark v. Brd. of Directors of Indep. School Dist., of Muscatine* (24 Iowa 266), ante. p. 179.

KERWER *v.* ALLEN, 31 IOWA 578

1. Tax Sale of Lands—Fraudulent Combination by Purchasers at to Prevent Competitive Bidding—Sales Void.—Where persons fraudulently agree to not bid against each other at a tax sale of several parcels of land, whereby each became purchasers of certain parcels without competitive bidding, the sales will be set aside in an action in equity therefor brought by the owner of the lands sold. And this rule applies against a purchaser of a parcel of land at such a sale who purchases with knowledge of the combination of the bidders and pursuant to the agreement, although he did not in fact enter into the agreement, pp. 579-581.

Reaffirmed in *Springer v. Bartle*, 46 Iowa 689; *Tyner v. Sexton & Son*, 48 Iowa 705 (abstract).

Reaffirmed and extended in *Fleming's Heirs v. Hutchinson*, 36 Iowa 523, holding further that when a purchaser of land at a judicial or execution sale combines with others to prevent free competition between bidders, and accomplishes this purpose, thereby obtaining the property for less than its value, the sale will be vitiated because of such fraudulent acts, when established by evidence.

Reaffirmed and varied in *Butler v. Delano*, 42 Iowa 355, holding that any arrangement between the treasurer and the purchaser, which substitutes a private for the public sale which the law contemplates, operates as a fraud upon the owner of the land, and renders the sale invalid.

Distinguished and narrowed in *Sibley v. Bullis*, 40 Iowa 430, holding that the rule is inapplicable as against a *bona fide* purchaser of the land from the fraudulent tax sale purchaser.

Distinguished in *Sully v. Poorbaugh*, 45 Iowa 454, a case wherein the facts were held not sufficient to make the rule apply; but the facts are not set out.

STONE *v.* SKERRY, 31 IOWA 582

1. Actions—No Notice—Want of Jurisdiction—Void judgment—Effect of Record Recitals.—Where the defendant has *no notice* of an action, or the court otherwise has no jurisdiction, a judgment rendered is void *ab initio*, although the record may recite facts constituting notice, or shows that the court had jurisdiction, p. 583.

Reaffirmed in Hubner v. Reickhoff, Ex'r, 103 Iowa 372, 373, 64 Am. St. Rep. 191, 72 N. W. 541.

Special cross reference. For further cases citing and sustaining the text, and many others on the question, see annotations under Rule 1 of Newcomb v. Dewey (27 Iowa 381), ante. p. 413.

WINNE v. ILLINOIS CENTRAL R. R. Co., 31 IOWA 583

1. Common Carriers—Carriage of Freight—Common Law Liability for—Burden of Proof.—A common carrier is responsible for the safe delivery of goods committed to its care and accepted by it for transportation, except when prevented by the act of God or the public enemy; and in an action against a common carrier for loss of goods received for transportation, the burden of proof is on the defendant to show circumstances relieving it from liability as above, pp. 586, 587.

Reaffirmed and extended in McCoy v. K. & D. M. R. R. Co., 44 Iowa 427, holding further that— under Sec. 1308 of the Code of 1873—a common carrier cannot, even by express contract, relieve itself of its Common Law liability.

Reaffirmed and narrowed in McCoy v. K. & D. M. R. R. Co., 44 Iowa 426, 427; Swiney v. American Express Co., 144 Iowa 344, 345, 115 N. W. 213, holding that in an action for injury to or loss of property received by a common carrier for transportation, the burden of proof is on it to show circumstances excusing or relieving it from liability: Holding, however, that a common carrier is not liable in transporting cattle, for injuries which may occur to them because of their own unruliness or viciousness while being transported, or for any injury or damage to them which may be prevented by the use of reasonable care by the owner, if he is in charge of them on the train and is overseeing their transportation; nor is a common carrier liable in damages for any cattle which die by reason of disease, or from failing strength on account of poor flesh, in being transported.

Cross references. See further on this question, annotations under McDaniel v. Ch. & N. W. Ry. Co. (24 Iowa 412), ante. p. 208; Angle v. Miss. & Mo. R. R. Co. (18 Iowa 555), Vol. II, p. 680.

Annotations to Decisions Reported in Volume 32 Iowa.

STATE *v.* WHITE, 32 IOWA 17

1. **Criminal Law—Misnomer of Accused in Indictment—When Objection to be Raised.**—Misnomer of accused in indictment must be objected to by him before or upon arraignment or the error is waived. The question must be raised by motion to correct at the time stated. It cannot be raised by motion in arrest of judgment, p. 19.

Reaffirmed and extended in State *v.* Winstrand, 37 Iowa 112, 113, holding further that a misnomer of accused in the indictment cannot be raised by demurrer.

Cited in State *v.* Brooks, 85 Iowa 368, 52 N. W. 241, the court holding that a clerical error in an indictment discoverable by a casual reading thereof does not affect its validity, and may be corrected upon motion at any stage of the proceedings.

FISHER *v.* FISHER, 32 IOWA 20

1. **Divorce and Alimony—Application for Change of Alimony—When to Be Changed.**—Under Sec. 2537 of the Code of 1860, the court may subsequent to a decree of divorce and awarding of alimony, change the decree in reference to the alimony when the circumstances render it expedient. But it should not be changed unless the party applying therefor shows substantial reasons which in justice and equity demand it.

When such an application for a change in alimony is made by the husband, the court will consider whether the alteration of circumstances has been brought about by his own improper conduct, p. 21.

Reaffirmed in Graves *v.* Graves, 132 Iowa 201, 202, 206, 207, 10 I. R. A. (N. S.) 216, 10 Am. & Eng. Ann. Cas. 1104, 109 N. W. 708, under Sec. 3180 of the Code of 1897.

Cited in Zuver *v.* Zuver, 36 Iowa 197, the case turning on the right of the court to award alimony and decree the custody of the children in an action for divorce, even though the petition does not pray therefor, and what is reasonable alimony, etc.

WARREN *v.* SCOTT, 32 IOWA 22

1. **Appeal from Justice's to Circuit Court—When Amendment or Additional Pleading May be Filed.**—Upon an appeal from a justice's to the circuit court, a party may be allowed, under equitable

and proper circumstances, and after excusing his failure to plead before the justice, to file an amendment, or additional pleading which sets up a new and distinct cause of action or defense. And an agreement whereby a party is allowed to file such a pleading dispenses with the necessity of his showing such equitable circumstances, p. 25.

Reaffirmed and explained in Clow v. Murphy, 52 Iowa 697, 3 N. W. 724, holding that upon an appeal either to the circuit or the district court from a justice's court, amendments to pleadings are to be allowed, within a sound judicial discretion, and in furtherance of justice.

Reaffirmed and extended in Ping v. Cockyne, 37 Iowa 212, holding further that when a party files an additional pleading in the circuit court without showing equitable circumstances as in the text, and the adverse party raises no objection thereto but proceeds to trial, it will not be ground for reversal.

Reaffirmed and extended in Griswold v. Bowman, 40 Iowa 369, holding further that the filing of amendments upon appeal from a justice's to the district, or circuit court, is a matter within the discretion of the latter court; but that the refusal to allow an amendment upon such an appeal is proper, when it sets up a matter over which the justice's court had no jurisdiction.

Cross references. See further on this question, annotations and cross references under May v. Wilson (21 Iowa 79), Vol II, p. 874; Stanton v. Warrick (21 Iowa 76), Vol. II, p. 873.

***BENEDICT v. HUNT, 32 IOWA 27**

1. Practice—Motions—Waiver of Error in Rulings on.—Error, if any, in the court's overruling defendant's motion for further time to answer, is waived by his subsequently filing an answer, p. 29.

Reaffirmed and varied in Stineman v. Beath, 36 Iowa 79, holding that error, if any, in the court's overruling a motion to strike out the verification to a petition and to make the petition more specific, is waived by the defendant later filing a demurrer to the pleading.

Reaffirmed and varied in Shugart & Lininger v. Pattee, 37 Iowa 424, holding that error, if any, in overruling a motion to strike a supplemental petition from the files, is waived by the defendant thereafter filing an answer thereto and going to trial on the merits.

Cited with approval in Clary v. Iowa Midland R. R. Co., 37 Iowa 350, the case turning on another point.

2. Mortgage on Land—Action against Purchaser of Land for Personal Judgment for Mortgage Debt—Defenses—Fraud and Want of Consideration.—Where the mortgagee of land sues a subsequent purchaser thereof seeking to make him personally liable for the mortgage debt in that he had agreed with the mortgagor, as part of the

*Note. The case of Blair Town Lot & Land Co. v. Walker, 50 Iowa 380, cites this case, but is not in point on anything in it.—Ed.

purchase price, to pay the mortgage debt, the defendant (purchaser) may plead as a defense, failure of consideration for the contract between himself and the mortgagor, or he may so plead fraud or false representations of the mortgagor inducing the contract, pp. 30, 31.

Reaffirmed and qualified in Schafer v. Wilson, 113 Iowa 479, 85 N. W. 791, holding that it is only where the grantee does not get the property that he can set up a defense to his contract of assumption of the mortgage lien: That the grantees of real estate cannot escape liabilities they assume by the conveyance, because it misdescribes the property conveyed.

3. Pleading—Demurrer to Portion of Pleading or Count Not Allowed.—A party cannot select and demur to one of two or more allegations of a pleading containing what is intended as, and is in fact, the statement of a single cause of action or defense, p. 31.

Reaffirmed and explained in Shulte & Wagner v. Hennessy, 40 Iowa 354, holding that it is improper to assail a clause, or a sentence, or several of them by demurrer; but that such objectionable matter should be reached by motion to strike.

Reaffirmed and explained in Seaton v. Grimm, 110 Iowa 147, 148, 81 N. W. 225, holding that where a pleading is good in part, but contains irrelevant or redundant matter, the latter may be stricken upon motion therefor, but cannot be reached by demurrer; but if the entire matter of a pleading is subject to this objection, a demurrer will lie.

WISE & HANSLIP v. BOSLEY, 32 IOWA 34

1. New Trial—Newly Discovered Evidence—Evidence Impeaching Witness Not Ground for.—Newly discovered evidence which would impeach a witness who testified for the successful party is not ground for a new trial, p. 36.

Reaffirmed in Dunlavey v. Watson, 38 Iowa 402; State v. Pell, 140 Iowa 669, 119 N. W. 159.

STATE v. COLLINS, 32 IOWA 36

1. Homicide—Self Defense, What Sufficient to Constitute.—In order to make a homicide justifiable it is not necessary that the danger to accused in fact existed, but it is sufficient if, at the time of the killing, there was actual and real danger to the comprehension of accused as a reasonable man.

Upon the trial of an indictment for homicide where the defense is self defense, the inquiry is not whether the harm apprehended was actually intended by the assailant, but was it actual and real to the accused as a reasonable man as compared with danger remote or contingent, p. 39.

Reaffirmed in State v. Middleham, 62 Iowa 155, 17 N. W. 448.

Reaffirmed and explained in State v. Frauenburg, 40 Iowa 557, holding, also, that the law gives a man the same right to use such

force as may be reasonably necessary, under the particular circumstances, to protect himself from *great bodily harm*, as it does to save his life.

Reaffirmed and varied in State v. Linhoff, 121 Iowa 638, 97 N. W. 79, holding that if one is unlawfully attacked, he may defend himself against the attack until he finds himself out of danger, and may even pursue his adversary for such purpose and to such extent, and if he kills the latter in so doing it is justifiable as self defense.

Cross reference. See further on this question, annotations under State v. Benham (23 Iowa 154), ante. p. 89.

2. Homicide—Evidence—Physical Strength and Character of Deceased—Threats.—Upon the trial of an indictment for homicide where the defense is self defense, evidence that the deceased was a large, muscular and powerful man who, when under the influence of liquor was quarrelsome, ugly, dangerous and vindictive, that accused knew these facts, and that the deceased was under the influence of liquor at the time he was killed, is competent.

Evidence, also, that shortly before the killing deceased threatened to take the life of accused, which was communicated to the latter before the deadly assault, is competent, pp. 38, 39.

Reaffirmed in State v. Graham, 61 Iowa, 609, 16 N. W. 744.

Reaffirmed and explained in State v. Hunter, 118 Iowa 691, 692, 92 N. W. 874, holding that upon the trial of an indictment for homicide where the plea of accused is self defense, evidence is admissible to prove that deceased, when he had lost money gambling, was a violent and quarrelsome man, and that, at the time of the fatal affray, he had just so lost money.

Reaffirmed and narrowed in State v. Middleham, 62 Iowa 153, 154, 17 N. W. 447, holding that upon the trial of an indictment for homicide where the accused pleads self defense, evidence is not admissible to prove that the *manner* of deceased was *reckless*.

3. Criminal Law—Trial—Evidence—Impeachment or Contradiction of Witness by Minutes of Preliminary Examination.—Even if the minutes of the preliminary examination before a justice of the peace were competent to impeach a witness introduced upon the trial of an indictment, they would not be competent for such purpose when the attention of the witness while testifying was in no way called to them, and he was therefore given no opportunity to explain his previous statements, pp. 39-41.

Reaffirmed and extended in State v. Hayden, 45 Iowa 14, 15, holding further that the minutes of an examining trial, or of the grand jury, are inadmissible to contradict or impeach a witness introduced upon the trial of an indictment.

Distinguished in State v. Fitzgerald, 63 Iowa 272, 19 N. W. 203, holding that upon the death of a witness before the trial of an indictment, what he gave as his testimony upon the preliminary examination

becomes evidence in the case, and may be proved in the same manner as the testimony of a deceased witness in a civil case.

HAYES v. STEELE, 32 IOWA 44

1. Principal and Agent—Ratification of Unauthorized Act by Silence of Principal.—Where a principal is notified by a person dealing with one claiming to be or acting as an agent of the former, that he (the person so dealing) has paid money to the acting agent under a certain contract seeking to bind the principal, and the latter thereafter remains silent and fails to repudiate the acts of the supposed agent, he thereby ratifies and makes valid the entire transaction, pp. 45, 46.

Reaffirmed in Alexander v. Jones, 64 Iowa 211, 212, 19 N. W. 915.

CITY OF DUBUQUE v. STOUT, 32 IOWA 47

1. Municipal Corporations—Wharves—Regulation of—Wharfage Fees—Rights of Riparian Land Owners.—A city granted power by its charter to "establish wharves" and "to regulate their use and fix the rate of wharfage" cannot recover fees of a person for the use of his own premises as a wharf, where such city has not, by ordinance or otherwise, provided wharves or designated places for such use. The right of a city to collect wharfage does not rest wholly in the police power, but is dependent upon its providing wharves and designating their uses, for the convenience of those using them, p. 49.

Reaffirmed and explained in City of Dubuque v. Stout, 32 Iowa 80, holding that where a charter of a city gives the city power and makes it its duty to establish wharves, docks, and landings, to fix the rate of wharfage and to regulate the stationary anchorage and moorings of all boats and rafts, it confers the power for the city to fix the location and limits of the wharves and landings, and to prohibit the use of any other place for such purpose.

Cited in Ahern v. Dubuque Lead & Level Mining Co., 48 Iowa 144, the court holding that the Legislature can fix the tolls to be charged by mill owners, and the owners of bridges; the charges to be made by the owner of wharves, docks, elevators, etc., and can prescribe a tariff of freights to be charged by railroad corporations.

Cross references. See further on this question, annotations under City of Muscatine v. Hershey (18 Iowa 39), Vol. II, p. 581; Le Claire v. City of Davenport (13 Iowa 210), Vol. II, p. 140.

STATE v. FELTER, 32 IOWA 49

(Former appeal, 25 Iowa 67.)

1. Criminal Law—Trial—Affidavits for a Continuance Admitted by Consent of State to Avoid Postponement—Inadmissible upon Subsequent Trial at Another Term.—Where the State, in order

to avoid a postponement of a trial on account of the absence of witnesses of accused, admits that they would make the statements contained in the affidavit of accused and that it may be read as their testimony, the accused cannot introduce such affidavit as their testimony upon another trial of the indictment had at another term, p. 51.

Reaffirmed and extended in Hudson v. Applegate & Co., 87 Iowa 607, 608, 54 N. W. 463; Neidy v. Littlejohn, 146 Iowa 358, 125 N. W. 199, holding further that the rule is equally applicable in a civil action.

2. Homicide—Insanity as Defense—Burden and Sufficiency of Proof to Establish.—Upon the trial of an indictment for homicide where the accused pleads insanity as a defense, the burden of proof is upon him to establish his insanity by a preponderance of the evidence, or, which is the same thing, by satisfactory evidence, pp. 52-54.

Reaffirmed in State v. Geddis, 42 Iowa 270, 271; State v. Bruce, 48 Iowa 534, 30 Am. Rep. 403; State v. Van Tassel, 103, Iowa 11, 12, 72 N. W. 490; State v. Robbins, 109 Iowa 651, 652, 80 N. W. 1061; State v. Novak, 109 Iowa 745, 746, 79 N. W. 475; State v. Thiele, 119 Iowa 660, 661, 94 N. W. 257; State v. Humbles, 126 Iowa 463, 102 N. W. 410; State v. Brandenberger, 151 Iowa 209, 130 N. W. 1070, holding that the rule is applicable in all criminal prosecutions where insanity is pleaded as a defense.

Reaffirmed and extended in State v. Brandenberger, 151 Iowa 209, 130 N. W. 1070, holding that the rule is applicable upon the trial of an indictment for murder where accused pleads as a defense that he fired the fatal shot while unconscious from a stroke on the head; and that in such case the accused is only required to prove such unconsciousness by a preponderance of the evidence.

Reaffirmed and varied in State v. Morphy, 33 Iowa 276-278, 11 Am. Rep. 122, holding that where upon the trial of an indictment for murder, the accused relies as a defense upon the hypothesis that the wound inflicted did not cause the death, but that it was caused by another direct cause, as by malpractice of the attending physician, or the like, the burden is on the accused to establish his hypothesis by a preponderance of or by satisfactory evidence.

3. Criminal Law—Homicide—Burden of Proof—Reasonable Doubt Entitles Accused to Acquittal—What Sufficient for.—The reasonable doubt which entitles an accused person to an acquittal is such an one which arises from all the evidence in the case; and the State must prove his guilt from all the evidence—the whole case—beyond a reasonable doubt.

Upon the trial of an indictment for murder the State must prove the killing by and malicious intent of accused beyond a reasonable doubt, pp. 51, 53, 54.

Reaffirmed and explained in State v. Porter, 34 Iowa 139, 140; State v. Stewart, 52 Iowa 285, 286, 3 N. W. 101; State v. Novak, 109 Iowa 742, 743, 79 N. W. 474, holding that the State must prove

beyond a reasonable doubt every material fact necessary to constitute the guilt of accused.

Cross reference. See further on this question, annotations under Rule 12 of State v. Ostrander (18 Iowa 435), Vol. 2, p. 662.

RYDER v. THOMAS, 32 IOWA 56

1. Actions—Attachment—Pleading—Cross Demand for Damages on Attachment Bond—Necessary Averments—Demurrer.—Where in an attachment action the defendant admits the indebtedness, and pleads a cross demand for damages by reason of the wrongful and malicious suing out of the writ and asks judgment therefor against the plaintiff and the sureties on the attachment bond, the defendant must set out the conditions of the bond in his answer and aver that the damages claimed have not been paid, or his pleading will be bad on demurrer, under Sec. 2760 of the Code of 1860, p. 57.

Reaffirmed in Warner v. Harrison, 37 Iowa 379.

Reaffirmed and extended in Hencke v. Johnson, 62 Iowa 557, 558, 17 N. W. 767, holding further that when defendant's cross demand is defectively pleaded as set out in the text, the plaintiff simply denies the averments thereof generally, and upon the trial the defendant introduces no proof of the damages, the plaintiff may raise the question of the defectiveness of the plea by motion for a new trial.

Distinguished and narrowed in Knapp & Spalding Co. v. Barnard & Co., 78 Iowa 349, 350, 43 N. W. 198, holding that when defendant's cross demand for damages is fatally defective as in the rule, and the joint issue claiming that the writ was rightfully sued out, denying any wrongful act, and denying that defendant has sustained any damages, a trial on the issue joined waives the defect in defendant's pleading.

WATROUS & SNOUFFER v. BLAIR, 32 IOWA 58

1. Contracts—Sale of Town Lots before Recording Plat—Validity.—The validity of a sale of a town lot as against the purchaser, is not affected by the fact that the vendor is liable to a penalty under Sec. 1027 of the Code of 1860, for failure to acknowledge and record the plat before making the sale, p. 61.

Reaffirmed and explained in Toovey v. Ayrhart, 136 Iowa 697, 114 N. W. 182, holding that a contract made in violation of a statute or founded upon an unlawful act in subversion of the policy of the state, whether it be *malum prohibitum* or *malum in se*, is void and cannot be enforced by action; but that this rule is applicable only where the transaction is prohibited as to both of the parties thereto: That if the intention of a statute is to prevent one person from doing that which is prejudicial to another, only the person forbidden to do the act is thereby guilty of a violation of law, and the other may assert his rights under the transaction, notwithstanding the prohibition.

Reaffirmed and extended in Pangborn v. Westlake, 36 Iowa 550, holding that in the case mentioned in the rule the vendor may maintain an action against the purchaser of the lot on the purchase money notes.

- *Reaffirmed and varied in* Tootle, Hosea & Co. v. Taylor, 64 Iowa 631, 632, 21 N. W. 116, holding that where a mortgagor of personal property retains possession thereof, a second mortgage thereon executed by him is valid, although Sec. 3895 of the Code of 1873, imposes a penalty on him for selling, etc., the mortgaged property.

Distinguished in Dillon & Palmer v. Allen, 46 Iowa 302, 26 Am. Rep. 145, holding that (in an action for services rendered for threshing grain) a contract in violation of Sec. 4064 of the Code of 1873 (requiring certain parts of threshing machines to be boxed) is void.

Distinguished in Dist. Township of Pleasant Valley v. Calvin, 59 Iowa 190, 191, 13 N. W. 81, holding that where a statute forbids a public officer to lend money in his hands in a fiducial capacity, and such officer in violation of law lends such money, taking a note therefor, that in an action on the note, the borrower cannot plead the prohibitive statute in avoidance of his liability.

Cross reference. See further in this connection, annotations under Pike v. King (16 Iowa 49), Vol. II. p. 403.

2. Lands—Vendor and Purchaser—Purchaser of City Lot with Reference to Plat—Rights of—Subsequent Change of Plat by Vendor without Consent of—Effect.—Where one purchases a city lot with reference to and relying upon a plat of the vendor laying off certain streets, alleys, and squares, he has a right to the use of the latter; and the fact that the vendor thereafter and without his consent, changes the plat and acknowledges and records it as changed, and his (the purchaser's) failure to object thereto, does not affect his right, p. 63.

Reaffirmed and extended in Fisher v. Beard, 32 Iowa 352, holding further that the rule is the same where the vendor dedicates property to public use by parol and then sells lots in reference thereto.

Cross references. See further on this question, annotations under Morrison v. Marquardt (24 Iowa 35), ante. p. 145; Leffler v. City of Burlington (18 Iowa 361), Vol. II, p. 649; City of Dubuque v. Maloney (9 Iowa 450), Vol. I, p. 606.

3. Lands—Possession as Constructive Notice.—Actual possession of land is notice to all persons dealing therewith of the rights or title of the one holding such possession, pp. 63, 64.

Special cross reference. For cases citing and sustaining the text and many others on the question, see annotations under Dickey v. Lyon (19 Iowa 544), Vol. II, p. 763.

JORDAN v. PING, 32 IOWA 64

1. Actions—Practice—Transfer of Interest of Plaintiff Pending Action.—Under Sec. 2794 of the Code of 1860, no action shall

abate by the transfer of any interest therein during its pendency. * * * In case of a transfer of the pecuniary interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer or assignment is made to be substituted in the action, proper orders being made as to security for costs, p. 66.

Reaffirmed and explained in Snyder v. Phillips, 66 Iowa 482, 24 N. W. 6, holding that under 2561 of the Code of 1873, corresponding to the section of the rule, when an action has been commenced, and the plaintiff transfers his interest in the action pending the litigation, it is discretionary with the court whether the assignee shall be substituted as plaintiff.

NOLL v. DUBUQUE B. & M. R. R. Co., 32 Iowa 66

(Later Appeal 44 Iowa 293.)

1. Railroads—Right of Way, Nature of—Power of Legislature to Pass Laws Disposing of upon Abandonment—Chap. 91, Acts of 1870, Construed.—Where land is acquired by a railroad company for a right of way under the general law authorizing condemnation proceedings therefor, it takes by grant from the state. And therefore, the Legislature may, upon the company failing to construct, or to operate its road, within a given time, transfer the easement to another company, upon compensation being made to the first company: And this is the object of Chap. 91, Acts of 1870 (13th General Assembly), pp. 67, 70.

Reaffirmed in C. I. R. Co. v. M. & A. R. Co., 57 Iowa 251, 253, 254, 10 N. W. 641, upholding constitutionality of Secs. 1260 and 1261 of the Code of 1873, and the Act of 1874 amending Sec. 1260, in reference to abandonment of a right of way by a railroad company by failure to construct, or by non-user, for eight years.

Reaffirmed and varied in Smith v. Hall, 103 Iowa 97, 98, 72 N. W. 428, holding that when a railroad fails to construct its road for eight years, or fails to use and operate it for such number of years consecutively, the right of way reverts—under Sec. 1260 of the Code of 1873—to the owner of the land at the time the abandonment becomes complete and not to the original owner of the land.

Reaffirmed and varied in Remey v. Iowa Central Ry. Co., 116 Iowa 136, 138-140, 142 (Cited in concurring and dissenting opinions, 153, 155, 156, 159, 162, 164, 165), 89 N. W. 233, holding that under Secs. 2015 and 2016, of the Code of 1897, before the lapse of eight years the right of way of a railroad company remains in tact, and may be condemned as such, but for the benefit of the former company only, with damages payable to the owner of the fee when those formerly assessed have not been paid, or, if paid, have been returned: But that after the lapse of eight years of non-user it ceases to exist as such, and is to be acquired in the same manner as rights of way are obtained in the first instance.

Cited in Gano v. Minn. & St. L. R. R. Co., 114 Iowa 721, 89 Am. St. Rep. 393, 55 L. R. A. 263, 87 N. W. 717, the court holding—as does the present case in argument—that Eminent Domain is the exercise of the Sovereign power of the State whereby private property is taken for public use or benefit, to promote the general welfare.

Cited in Watkins v. Iowa Central Ry. Co., 123 Iowa 405-407 (dissenting opinion), 98 N. W. 915, 916, the majority court opinion under Rule 2 of this present case (below), which see for syllabus.

Cross reference. See Rule 2 hereof in this connection.

2. Lands—Easements—Easement Acquired by Deed—Limitations of Actions—Mere Non-User Does Not Affect or Bar.—Where an easement is acquired by deed, the mere non-user thereof, unaccompanied by use adverse to the grantor, does not affect his rights or bar an action for its recovery under the statute of limitation—Code of 1860, p. 71.

Special cross reference. For cases citing, sustaining and distinguishing the text, and others on the question, see annotations under Rules 2 and 3 of Barlow v. Ch. R. I. & P. R. R. Co., (29 Iowa 276), ante. p. 526.

THOMAS v. STICKLE, 32 IOWA 71

1. Conveyance—Warranty—Breach of Covenants—Purchase of Paramount Title by Grantee—Action for Damages—Burden of Proof.—A grantee may voluntarily yield the possession to him who has the better title, or may purchase and hold it; and this is a sufficient ouster or disturbance to sustain an action on the covenant of warranty. But if the grantee yields possession or buys in an outstanding title he does so at his peril. If the title to which he yields or which he buys is not good, he must stand the loss; and in either case, in an action against his warrantor, the burden of proof is upon him to show that the title purchased by him, or to which he yielded, was paramount to that of his grantor; although it is otherwise in case of an eviction by force of a judgment at law, with notice of the suit to the warrantor, p. 76.

Reaffirmed in Eversole v. Early, 80 Iowa 604, 605, 44 N. W. 898.

Reaffirmed and explained in Richards v. Iowa Homestead Co., 44 Iowa 305, 306, 24 Am. Rep. 745, holding that one holding lands under a deed of warranty may, at his peril, acquire a paramount title in defense of his possession, and in a proper action recover of the grantor in such deed, upon his covenants therein; and that the right of recovery in such a case is limited to the amount of damage actually sustained by the grantee, which is the sum paid for the paramount title, not exceeding the consideration of the deed upon which the action is brought.

Reaffirmed and extended in Smith v. Keeley, 146 Iowa 664, 125 N. W. 670, holding further that a grantee may recover of his grantor

upon covenants of warranty, reasonable expenses involved in quieting or removing a cloud from the title, or such expenses in defending against a hostile title to the land conveyed.

Distinguished in Snell v. Iowa Homestead Co., 59 Iowa 703, 704, 13 N. W. 848, holding that until one in possession of land under a warranty deed and who has not been evicted, buys in an outstanding paramount title, he cannot sue his vendor upon the warranty and recover other than nominal damages.

Cross references. See further on this question, annotations and cross references under Baker v. Corbett, Adm'r (28 Iowa 317), ante, p. 458.

2. Tax Sale of Land—Limitation of Action to Recover.—Under Sec. 790 of the Code of 1860, no action can be maintained for the recovery of land sold for taxes, or involving the title of the tax purchaser, his assignee or grantee unless commenced within five years from the execution and recording of the tax deed. And this is the rule although the deed shows on its face that several parcels of land were sold in a lump for a gross sum.

The statute of limitation is one of repose. Under Sec. 785 of the Code of 1860, the title to land sold for taxes vests in the tax sale purchaser, when the tax deed is *executed and recorded* in the proper record of titles; and the statute of limitation (five years) prescribed by Sec. 790 of that Code commences to run against the owner of the land sold and for its recovery, from that time, and not from the date of sale, pp. 77, 78.

Reaffirmed in Douglass v. Tullock, 34 Iowa 263; Jeffrey v. Brokaw, 35 Iowa 506; Pierce v. Weare, 41 Iowa 381; Bullis v. Marsh, 56 Iowa 749, 2 N. W. 579; Monk v. Corbin, 58 Iowa 506, 12 N. W. 572.

Reaffirmed and explained in Lawrence & Burd v. Hornick, 81 Iowa 196, 46 N. W. 988, holding that when the county treasurer buys land sold for taxes by him, or becomes directly or indirectly interested in such purchase, as prohibited by Sec. 885 of the Code of 1873, the sale is *voidable* merely, and the limitation of the text applies.

Reaffirmed, explained and qualified in Griffin v. Bruce, 73 Iowa 127, 34 N. W. 774; Waggoner v. Mann, 83 Iowa 21, 48 N. W. 1067, holding that where a tax sale of land is *void*, by reason of there being no levy, assessment, or sale, or where the taxes were paid before the sale, or the land was not subject to taxation, or the like, Sec. 902 of the Code of 1873, corresponding to the section of the text, has no application; but where the sale is *voidable merely* by reason of irregularities and failures to observe the provisions of the statute as to the manner of the levy, assessment or sale, the sale cannot be questioned after five years from the recording of the tax deed.

Cited in Robinson v. Allen, 37 Iowa 29, the court holding that when defendant does not rely upon the statute of limitations by demurrer if

the bar is shown on the face of the petition or by answer in any other case, he waives his rights under it.

Cited in Bulkley v. Callanan, 32 Iowa 466, turning upon another question in relation to a tax sale and deed.

Cross references. See further on this question, annotations under Case v. Albee (28 Iowa 277), ante. p. 452; Rule 6 of Eldredge v. Kuehl (27 Iowa 160), ante. p. 381.

3. Tax Sale of Land—Purchase by Owner—Estoppel of Owner to Claim Title under.—Where the owner of land purchases it at a tax sale, and thereafter conveys it by quitclaim deed, he cannot later assert his tax title as against his grantee, p. 79.

Cited in Curtis v. Smith, 42 Iowa 671, the court holding that an owner of land, or one under obligation to pay taxes thereon, cannot acquire a tax title so as to defeat incumbrancers or others setting up a claim or title adverse to him; and this rule applies to tenants in common and those holding under the owner of the property; but that one in possession of land, but having no interest therein, and who is under no obligation to pay taxes thereon, and not holding as tenant, trustee, or agent of or for the owner, may become a purchaser at a tax sale thereof: And that this rule applies to the grantee of such land under a quitclaim deed which conveys no interest therein, and who holds possession hostile to the land owner.

Cited in Blumenthal v. Culver, 116 Iowa 329, 89 N. W. 1117, the court holding that one having an interest in land and whose duty it is to pay the taxes thereon, cannot either by purchase at a tax sale thereof, or by taking an assignment of the tax sale certificate, defeat the rights or interests of others therein.

Cited in Nat'l Surety Co. v. Walker, 148 Iowa 162, 163, 125 N. W. 340, the court holding that one in possession of real estate or whose duty it is to pay the taxes, cannot acquire by tax deed a title which will defeat a conflicting claimant or lien-holder, and this applies to any person having such an interest in land as would entitle him to redeem from the tax sale.

CITY OF DUBUQUE v. STOUT, 32 IOWA 80, 7 AM. REP. 171

(Case involving the same facts, 32 Iowa 47.)

1. Municipal Corporations—Wharves—Power to Establish and Regulate, etc.—Where a charter of a city gives the city power and makes it its duty to establish wharves, docks, and landings, to fix the rate of wharfage and to regulate the stationary anchorage and moorings of all boats and rafts, it confers the power for the city to fix the location and limits of the wharves and landings, and to prohibit the use of any other place for such purpose, p. 84.

Reaffirmed and extended in City of Keokuk v. Northern Line Packet Co., 45 Iowa 209, 211, (Cited in dissenting opinion 215), holding further that in the exercise of their police powers the cities of the State

may control the landings of boats, designating the place they shall receive or discharge freight and passengers: That it is within their power to require this to be done at these wharves and to charge reasonable compensation therefor.

Cited in Ahern v. Dubuque Lead & Level Mining Co., 48 Iowa 144, 30 Am. Rep. 390, the court holding that the Legislature can fix the tolls to be charged by mill owners, owners of bridges; the charges to be made by owners of wharves, docks, elevators, etc., and can prescribe a tariff of freights to be charged by railroad corporations.

Cited in Des Moines Street R. R. Co. v. Des Moines Broad-Guage Street Ry. Co., 73 Iowa 521, 33 N. W. 614, not in point.

Unreported Citation 138 N. W. 545.

Cross reference. See further on this question annotations under City of Dubuque v. Stout (32 Iowa 47), ante. p. 713.

STATE v. SHEAN, 32 IOWA 88

1. Criminal Law—Seduction—Evidence—Character of Prosecutrix.—Where upon the trial of an indictment for seduction the accused introduces evidence of acts of lewdness and immodesty and specific acts of sexual intercourse by the prosecutrix prior to the alleged time of the seduction, the State may prove in rebuttal that before that time she was a young woman of good character for chastity, was correct and modest in her deportment, and was considered a virtuous girl; and these facts may be testified to by those acquainted therewith. pp. 90-92.

Reaffirmed in State v. Lenihan, 88 Iowa 673, 674, 56 N. W. 293.

Reaffirmed and explained in State v. Wells, 48 Iowa 674, holding—as does the present case in argument—that upon the trial of an indictment for seduction, the previous chaste character of the prosecutrix is presumed, and the burden is on the accused to overcome it by proof; and that an instruction to this effect upon such trial is not erroneous.

Reaffirmed and explained in State v. Hummer, 128 Iowa 506, 507, 104 N. W. 723, holding that upon the trial of an indictment for seduction, the reputation of the prosecutrix for morality which may be shown in rebuttal of evidence tending to prove specific acts of lewdness or unchastity, is a reputation for morality in the sexual relations, that is, a reputation for sexual virtue, and not merely reputation as to general good moral character.

Reaffirmed and qualified in State v. Prizer, 49 Iowa 533, 534, 31 Am. Rep. 155; State v. Reinheimer, 109 Iowa 626, 80 N. W. 670, holding that upon a trial of an indictment for seduction, evidence of reputation is not admissible upon the issue involving the woman's character, but only to discredit or support testimony tending to establish particular acts of lewdness.

Cited in State v. Mulholland, 115 Iowa 172, 88 N. W. 326, the case turning upon the weight and sufficiency of evidence to sustain a conviction for seduction.

Unreported Citation 138 N. W. 866.

BURGE v. CEDAR RAPIDS & MO. R. R. Co., 32 IOWA 101

1. Contracts—Breach of by One Party after His Partially Performing—Rescission of Other Party—Statu Quo—Action for Damages.—Where after a partial performance by him of a contract, a party fails or refuses to further comply therewith, the other party thereto is not entitled to a rescission without restoring or offering to restore the consideration or thing of value received thereunder. In general a rescission of a contract cannot be had unless the parties can be placed in *statu quo*.

If one of the parties to a contract has derived an advantage from a partial performance, he cannot hold this and consider the contract as rescinded, because of the non-performance of the residue, but must do all that the contract obliges him to do, and seek his remedy in damages, p. 105.

Reaffirmed in Montgomery v. Gibbs, 40 Iowa 656; Frederick v. Davis, 133 Iowa 362, 110 N. W. 611; Fagan v. Hook, 134 Iowa 389, 105 N. W. 158.

Reaffirmed and explained in Myer & Dostal v. Wheeler & Co. 65 Iowa 396, 21 N. W. 695, holding that a rescission of a divisible contract will not be allowed for a breach thereof, unless such breach goes to the whole of the consideration.

Reaffirmed and explained in Stevenson v. Polk, 71 Iowa 295, 32 N. W. 349, holding that before a contract can be rescinded by one party, he must place the other party in the same position he was at the time the contract was made, or the power to do so must at least exist.

Reaffirmed, explained and extended in Downey v. Riggs, 102 Iowa 92, 70 N. W. 1092, holding that a purchaser can recover money paid upon a contract for the purchase of land, when the contract is rescinded by mutual consent of the parties; or, when the vendor cannot or will not perform his part of the contract; or, when the vendor has been guilty of fraud; or, when by the contract the purchaser has the right to rescind by a stipulated time, or by doing a certain act, and he so elects; or, where the contract is to be performed and completed by a certain time, and both parties are in default at such time: But a purchaser under such a contract, cannot recover money paid, when he fails or refuses to comply with the contract, in the absence of a provision in the contract therefor.

Reaffirmed and qualified in Quarton v. Am. Law Book Co., 143 Iowa 528, 531, 121 N. W. 1013, 1014, holding that where a contract is to be performed by one of the parties thereto at a certain time, and before such time such promisor expressly renounces the contract or

disables himself from performing it, the other party or promisee may sue for breach thereof before the time of performance: That a rescission of a divisible contract will not be allowed for a breach thereof, unless such breach goes to the whole of the consideration.

TOMLIN v. DUBUQUE, BELLEVUE & MISSISSIPPI R. R. Co., 32 IOWA 106, 7 AM. REP. 176

1. Navigable Waters—Riparian Land Owners, Rights of—Own to High Water-Mark—Railroad Built Below—Riparian Owner Not Entitled to Damages.—A riparian land owner holds the fee of the soil only to ordinary high water-mark; and the title of the soil, and bed of the stream below that point is in the State for the use of the public.

So a riparian proprietor cannot recover damages from a railroad company by reason of being deprived of free access to the river because of the construction of a railroad, done by authority of the state along the banks of a navigable river below high water-mark, pp. 109, 111.

Reaffirmed as to first paragraph in Dashiell v. Harshman, 113 Iowa 290, 85 N. W. 87.

Reaffirmed, explained and qualified in Musser v. Hershey, 42 Iowa 361, 362, 364, holding that a riparian owner of land outside a city, has the right to construct, below high water-mark, bridge piers and landings, and to reclaim the soil, conforming to state regulations and not obstructing navigation; but that these rights depend upon and are appurtenant to the adjacent soil, and are not the subject of sale, except by sale and conveyance of the land along the navigable stream.

Reaffirmed, explained and qualified in Steele v. Sanchez, 72 Iowa 67, 68, 2 Am. St. Rep. 233, 33 N. W. 367, holding that the boundary line of the riparian land owner is not changed or extended by a navigable stream being changed to a non-navigable stream: But the meander lines on a survey or plat are not boundary lines; and that a riparian owner along a navigable stream or lake owns to high water-mark or to the bank thereof; and that when such high water-mark is changed, either by natural or artificial means, the land owner's line is changed with it, and he owns to the new high water-mark or bank.

Reaffirmed and extended in Houghton v. C. D. & M. R. R. Co., 47 Iowa 371, 374, holding further that high water-mark, as the line between the riparian proprietor and the public, is to be regarded as co-ordinate with the limit of the river bed; and that what the river does not occupy long enough to wrest from vegetation, so far as to destroy its value for agriculture, is not river bed.

Reaffirmed and extended in Wood v. C. R. I. & P. R. R. Co., 60 Iowa 457-459, 15 N. W. 285; *Ch. B. & Q. Ry. Co. v. Porter Bros. &*

Hackworth, 72 Iowa 429, 430, 34 N. W. 288, holding further that where a railroad is constructed below high water-mark along a river front while it is a navigable stream, a subsequent act of Congress declaring the river non-navigable does not extend the boundary of the riparian owner or allow him to recover damages of the railroad company for use of the land below the former high water-mark.

Reaffirmed and extended in Ingraham, Kennedy & Day v. Ch. D. & M. R. R. Co., 34 Iowa 252, holding that under the statute law of this state a railroad company has a right to construct its railroad upon and over the streets and alleys of a city, upon obtaining authority from the city so to do; and the construction thereof is not a nuisance, and will not be enjoined, at the instance of owners of lots abutting thereon: And that the fact that land which is part of a street, or which lies between a street and a navigable slough, does not give the lot owner the right to enjoin the construction of a railroad thereon, when it is being done with the consent of the city.

Reaffirmed and extended as to first paragraph in Holman v. Hodges, 112 Iowa 716-718, 84 Am. St. Rep. 367, 58 L. R. A. 673, 84 N. W. 951, holding further that the title to an island in a navigable stream is in the state; and it is not divested by reason of a change in the channel of the river whereby the island is no longer separated from the mainland by water.

Reaffirmed and extended as to first paragraph in State v. Thompson, 134 Iowa 27, 111 N. W. 329, holding further that the rule is applicable to a navigable lake.

Reaffirmed and varied as to first paragraph in Brd. of Park Com'rs v. Taylor, 133 Iowa 461, 108 N. W. 930, holding that the changing of a navigable to a non-navigable river by Congress does not extend the boundary of a riparian land owner nor take away his right to land acquired by accretions.

Cited with approval in Cedar Rapids Gas Light Co. v. City of Cedar Rapids, 144 Iowa 435, 120 N. W. 969, the case turning on other questions.

Cited in Cook v. City of Burlington, 36 Iowa 365, the court holding that where accretions are caused by a river to the soil of the street, etc., dedicated under the Acts of Congress of July 2, 1836, and March 3, 1837, it is held by the city for public use and cannot be conveyed by the city for private purposes, but that a railroad may be granted a right of way over such land acquired by accretion, by the city, and this without payment of damages to the adjoining lot owner: That land becoming a part of a street or other public way by accretion, partakes of the same nature and is held by the same tenure as the land of which it becomes a part.

Cited in Kuchman & Hinke v. C. C. & D. Ry. Co., 46 Iowa 378, (dissenting opinion), the majority court opinion turning on another question.

Distinguished as to second paragraph in Renwick, Shaw & Cross-ett v. D. & N. W. R. R. Co., 49 Iowa 666, 669, holding that Sec. 2 of Chap. 35, Acts of 1874 (15th General Assembly) abrogates the rule as to the second paragraph, and requires riparian owners to be compensated for damages resulting from the construction of a railroad as in the text; and that such Act and Section is constitutional.

Cross reference. See further in this connection, annotations under Kraut v. Crawford (18 Iowa 549), Vol. II, p. 679.

BLACK HAWK COUNTY v. COTTER, 32 IOWA 125

1. Bastardy Proceeding—Nature of—Power of Mother to Compromise or Settle with Putative Father.—A bastardy proceeding is a civil action of a summary nature to secure to the woman a speedy remedy for the support of her infant child; and she may, by a fair settlement upon a reasonable consideration, preclude herself and the county from the right to maintain this proceeding in order to secure to her the maintenance of the child, p. 127.

Reaffirmed in State v. Noble, 70 Iowa 175, 30 N. W. 396.

Reaffirmed and qualified in State v. Shoemaker, 62 Iowa 344, 49 Am. Rep. 146, 17 N. W. 589, holding that when a man marries a woman known to be *enceinte*, he thereby adopts the child into his family at its birth and is liable for its support; and that no bastardy proceeding can, in such case, be instituted against the putative father: But that this rule of adoption does not apply as to heirship or inheritance.

HAUSON v. STEPHENSON, 32 IOWA 129

1. Trial—Evidence—Burden of Proof—Evidence in Equipoise, Effect.—Where the evidence upon a trial is in equipoise upon a material fact or facts, the party having the burden of proof must fail, p. 130

Reaffirmed in Cottrell v. Piath, 101 Iowa 236, 70 N. W. 178.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

WOOLSEY v. BOARD OF SUPERVISORS OF HAMILTON COUNTY, 32 IOWA 130

1. County Road—Establishment of—Sufficiency of Notice—Substantial Compliance with Statute.—A notice in relation to a proceeding to establish a county road need only substantially comply with Sec. 825 of the Code of 1860, in relation thereto, p. 132.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Rule 1 of McCollister v. Shuey (24 Iowa 362), ante. p. 198.

2. County Road—Establishment of— Parol Evidence of Posting of Notices—Presumption as to.—In an action involving the le-

gality or validity of proceedings establishing a county road, it is proper for the fact that the notices were posted, to be proved by parol evidence, and it will be presumed that due proof in that manner was made to the board of supervisors if it be not shown by the record, p. 132.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Rule 2 of *McColister v. Shuey* (24 Iowa 362), ante. p. 198.

3. County Road—Proceedings to Establish—Failure of Petitioners to Give Security for Expenses of Application—Effect.—The failure of the petitioners for the establishment of a county road to give, or the board of supervisors to require them to give, security for the expenses of the application as provided by Sec. 826 of the Code of 1860, does not affect the validity of the judgment therein establishing the road, p. 133.

Reaffirmed in *Sullivan v. Robbins*, 109 Iowa 237, 80 N. W. 340.

RICKMAN, ADM'R, v. STANTON, 32 IOWA 134

1. Decedent's Estate—Executors and Administrators—Discovery of Assets Wrongfully withheld from—Practice.—Secs. 2366, 2367 of the Code of 1860, providing that the county court may summon any person suspected of having taken wrongful possession of any assets, or effects of a decedent, or having them under control, and may subject such person to an examination under oath, etc., authorizes only the examination under oath of such person, and does not justify or allow the introduction of other evidence in behalf of the personal representative, pp. 137, 138.

Reaffirmed and explained in *Donover, Adm'r, v. Argo*, 79 Iowa 577, 578, 44 N. W. 819, holding that when the answers under oath and examination of the person charged with having the wrongful possession of assets of a decedent's estate show that he is not the owner of or entitled to the possession or control thereof, the court should order delivery to be made to the administrator (or executor) and provide in the order that upon the party's failure or refusal to comply therewith, if able to so do, he shall be imprisoned until his compliance, as allowed by Sec. 2380 of the Code of 1873.

Reaffirmed and extended in *Barto v. Harrison*, 138 Iowa 418, 419, 116 N. W. 319, holding that if it develops in the examination that the title to the property is in dispute, or that there is some controversy as to whether the estate is entitled thereto, then the administrator or executor must be relegated to procedure usually resorted to in order to adjudicate such issues: Holding further that the order in such proceeding is, to the extent authorized, conclusive, if not appealed from and reversed, set aside, or waived and relinquished.

Reaffirmed and extended in *Ivers, Adm'r, v. Ivers*, 61 Iowa 722, 17 N. W. 150, holding further that the finding of the court upon such

proceeding cannot be pleaded in bar of an action by the administrator to recover the property of the estate.

MOORMAN & GREEN *v.* COLLIER, 32 IOWA 138

1. Written Instruments—Assignment of—Action on, Who May Maintain.—Under Sec. 1796 of the Code of 1860, all written instruments are assignable; and the assignee of such an instrument may, thereunder, maintain an action thereon in his own name, pp. 139, 140.

Distinguished in Rappleye *v.* Racine Seeder Co., 79 Iowa 225-229, 7 L. R. A. 139, 44 N. W. 365, holding that an executory contract for the sale of personal property (in this case machines) to be paid for by notes as installments are delivered, is terminated by the buyer making an assignment for the benefit of creditors: And the assignee cannot sue the seller for breach of contract by failing to deliver after such assignment.

Special cross reference. For cases citing the text, and many others on this question, see annotations under Rule 2 of Conyngham *v.* Smith (16 Iowa 471), Vol. II, p. 458.

2. Bond Given to Officer—Action on—Who May Maintain.—Under Sec. 2787 of the Code of 1860, when a bond given to an officer is intended for the security of a particular individual, suit may be brought thereon in the name of any person intended to be secured, p. 140.

Reaffirmed in Selz & Co. *v.* Belden, 48 Iowa 454.

Cited in State for use of Meeker *v.* McGlothlin, 61 Iowa 315, 16 N. W. 138, not in point, but upon analogy.

3. Bonds to Officer—Mistake of Law, Effect of.—A mistake of law or of the legal effect of a bond executed to an officer cannot be taken advantage of or pleaded as a defense by the signers in an action thereon, p. 140.

Reaffirmed in Glenn & Pryce *v.* Statler, 42 Iowa 109, 110.

Reaffirmed and extended in Marshall & Sharp *v.* Westrope, 98 Iowa 336, 67 N. W. 261, holding further that equity will not reform a written contract or instrument to correct a mistake of law as to the legal effect thereof.

Distinguished in Stafford *v.* Fetters, 55 Iowa 487, 488, 8 N. W. 324; Reed *v.* Root, 59 Iowa 361, 13 N. W. 324, holding that when parties enter into an agreement which, through a mistake of law or fact, they reduced to writing and the instrument fails to express their true agreement, or omits stipulations agreed upon, or contains terms contrary to the intention of the parties, equity will reform the writing, making it conform to the agreement entered into by the parties.

4. Written Contracts—Construction of.—In construing a written contract the court will give it the construction which will bring it

as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law, will permit; and the court will not adopt a construction which will do violence to the rules of law or of language, pp. 140, 141.

Reaffirmed in Kern & Son v. Wilson, 73 Iowa 493, 35 N. W. 596.

(Note.—In this case neither fraud, accident or mistake of fact was pleaded or in issue.—Ed.)

OFFICER v. HOWE, 32 IOWA 142

1. Written Instruments—Fraud, Accident or Mistake—Parol Evidence.—Parol evidence is admissible to prove fraud, accident or mistake, in an action on a written instrument p. 143.

Reaffirmed in Providence Jewelry Co. v. Fessler & Sons, 145 Iowa 80, 123 N. W. 959.

(Note.—There are numerous cases sustaining but not citing the text.—Ed.)

LLOYD v. PERRY, 32 IOWA 144

1. Conflict of Laws—Statute of Limitation—Cause of Action Barred by Laws of Another State, Barred Here.—Under Sec. 2746 of the Code of 1860, if a cause of action arises in another state, and is barred by the statute of limitation of another state or country where the defendant has previously resided for the period of the limitation, then it is barred when sued on in this state; and such fact is a full defense to the action in this state. The fact that such defendant resided in this state before he went to the other state or country where the cause of action arising out of this state was so barred, does not change the rule,—Sec. 2745 of the Code of 1860, as to the suspension of the statute of limitation by non-residence of defendant, having application only to causes of actions *arising in this state*, and Sec. 2746, above, as amended, by Sec. 10, Chap. 167, Acts of 1870, not applying to this case, pp. 145, 146.

Reaffirmed in Smyth v. Peters Shoe Co., 111 Iowa 389, 390, 82 N. W. 899, under Sec. 3452 of the Code of 1897, corresponding to the law of the text.

Reaffirmed and extended in Thompson v. Reed, 41 Iowa 49-51, holding further that the repeal of a statute of limitation, and of course an amendment thereof, cannot act retrospectively, so as to disturb rights acquired thereunder and deprive parties of protection to which they are fully entitled under the prior enactment: Holding further that Sec. 10, Chap. 167, Acts of 1870, amending Sec. 2746 of the Code of 1860, so that such Section does not operate upon a cause of action arising in this state, does not apply to or revive a cause of action previously barred by such section

Distinguished and narrowed in Moran v. Moran, 144 Iowa 459-462, 123 N. W. 205, holding that when a contract is entered into in this state, the cause of action arises in this state within the meaning

of the statute, and the rule of the text does not apply although the defendant resides out of this state after the execution of the instrument for such period as would bar it by the laws of the state of his residence but for the execution thereof herein.

REYNOLDS v. HINDMAN, 32 IOWA 146

1. Negligence—Action for—Contributory Negligence—Pleading and Burden of Proof—Violation of Statute by Defendant, Is Negligence.—A plaintiff cannot recover for an injury resulting from the negligence of the defendant, if, notwithstanding such negligence, he might have avoided the injury by the exercise of ordinary care and prudence on his part, or if he (plaintiff) in any way contributed directly to the injury. And in such an action the plaintiff must aver and prove both the negligence of defendant and his own use of ordinary care and absence of contributory negligence.

But in an action for personal injury caused in the operation of a threshing machine, proof by plaintiff of the failure of defendant to have the tumbling rods, etc., of the machine boxed or secured while running as provided and required by Chap. 135, Acts of 1866 (11th General Assembly) is sufficient proof of the negligence of defendant, pp. 147-149.

Reaffirmed and explained in Correll v. B. C. R. & M. R. R. Co., 38 Iowa 122-124; Tobey v. B. C. R. & N. Ry. Co., 94 Iowa 265, 33 L. R. A. 496, 62 N. W. 764; Knowlton, Adm'r, v. Des Moines Edison Light Co., 117 Iowa 458, 90 N. W. 820, holding in actions against railroad companies, and an electric light company, that the doing of a prohibited act, or the failure to perform a duty enjoined by statute or ordinance, constitutes negligence for which the party guilty of such act or omission is liable, unless excused by the contributory negligence of the one to whose person or property an injury is done.

Reaffirmed as to first paragraph in Gregory v. Woodworth, 93 Iowa 248, 61 N. W. 963.

Special cross reference. For further cases citing and sustaining the first paragraph of the text, and many others on this question, see annotations under Rule 1 of Spencer v. Ill. Cent. R. R. Co. (29 Iowa 55), ante. p. 497; Rule 5 of Donaldson et al, Adm'rs, v. M. & M. R. R. Co. (18 Iowa 280), Vol. II, p. 627.

LEMMON v. CHICAGO & NORTHWESTERN R. R. Co., 32 IOWA 151

1. Railroads—Liability for Killing or Injuring Stock—Failure to Maintain or Keep Fences in Repair.—After a railroad company has fenced its road on both sides thereof, at all points where it has a right to fence, with a good and lawful fence, then it is required to use only ordinary and reasonable care and diligence to maintain and keep the same in repair; that is, such care as a reasonable man would

use in keeping his own fences in repair under similar circumstances, p. 152

Reaffirmed and explained in Shellabarger v. Ch. R. I. & P. Ry. Co., 66 Iowa 20, 23 N. W. 159, holding that—under Sec. 1289 of the Code of 1873, (Sec. 6, Chap. 169, Acts of 1862), a railroad company is liable absolutely for killing or injuring stock running at large, by its trains at a place where it has a right to but fails to fence; but that if, at such place, the company erects a fence which is reasonably sufficient to prevent stock from going upon the track, it is not so liable for so killing or injuring breachy, or vicious stock that break through or pass over such fence, and get upon its track.

Special cross reference. For further cases citing and sustaining the text, and many others on the question, see annotations under Aylesworth v. Ch. R. I. & P. R. R. Co. (30 Iowa 459), ante. p. 623.

Cross reference. See further in this connection, annotations and cross references under Fernow v. D. & S. W. R. R. Co. (22 Iowa 528), ante. p. 66.

TACKABERRY & CO. v. CITY OF KEOKUK, 32 IOWA 155

1. Municipal Corporations—Taxation and Revenue—Assessment—Personal Property, of What Date Assessed.—Under Sec. 719 of the Code of 1860, the owner of personal property on the first day of January must pay City taxes thereon for that current year, of which date it is to be assessed therefor, pp. 156, 157.

Reaffirmed and extended in Wangler Bros. v. Black Hawk County, 56 Iowa 385, 386, 9 N. W. 315, holding further that under Sec. 812 of the Code of 1873, corresponding to the section of the text, the rule applies to the assessment of taxes for county purposes; and that when personal property is assessed for such purpose to one who becomes the owner thereof after January 1, of the current year, it is illegal, and the collection thereof will be enjoined upon complaint of such owner: And holding further that personalty not in this state on the first day of January is not taxable for that year.

2. Taxation and Revenue—Illegal Assessment—Injunction to Restrain Collection of Taxes.—Where property is illegally assessed for taxes to one not liable to pay them, injunction will lie upon his complaint to restrain their collection, pp. 156-158.

Reaffirmed in Wangler Bros. v. Black Hawk County, 56 Iowa 386, 9 N. W. 315.

Reaffirmed and qualified in In re Kauffman's Estate, 104 Iowa 640, 641, 74 N. W. 9, holding that mere irregularities in the assessment not resulting in injury will not defeat the collection of taxes justly due.

Cross references. See further on this question, annotations under Rule 2 of Conway v. Younkin, treasurer (28 Iowa 295), ante. p. 455; Macklott v. City of Davenport (17 Iowa 379), Vol. II, p. 541.

CHAMBERLAIN *v.* COBB, 32 IOWA 161

1. Bailment—Bailor and Bailee Mutually Benefited by—Degree of Care Required of Bailee—Negligence.—Where a bailment is for the benefit of both parties thereto, the bailee is only liable for loss or injury to the property caused by his failure to use ordinary care in keeping and caring for it.

So where the owner of a horse delivers it to another to be fed, kept and cared for, the latter to use it and work it as his own, the transaction is a bailment for the benefit of both, and the bailee is not liable for injury to or death of the animal, unless caused by his failure to exercise such care, p. 162.

Reaffirmed as to first paragraph in Bowman *v.* Western Fur Mfg. Co., 96 Iowa 194, 64 N. W. 777; Hunter *v.* Ricke Bros., 127 Iowa 111, 102 N. W. 827.

PICKERING *v.* KIRKPATRICK, 32 IOWA 163

1. New Trial—Discretion of Trial Court—Appeal from Order Granting or Refusing—Reversal, When.—The action of the district court in determining a motion for new trial will not be interfered with unless there has been a manifest abuse of discretion, or violation of some rule of law; and when a new trial has been *granted*, the Supreme Court will require a stronger showing to reverse than where it has been refused, p. 165.

Reaffirmed in Hopkins, Adm'r, *v.* Knapp & Spalding, 92 Iowa 213, 60 N. W. 620.

Reaffirmed and qualified in Snyder *v.* Thompson, 134 Iowa 727, 112 N. W. 240, holding however, that the discretion of the trial court in passing upon motion for new trial is a legal one, to be exercised by legal rules, and that when the Supreme Court is satisfied that such a rule was violated, the order will be reversed.

Cited in Gurth *v.* Bell, 153 Iowa 518, 133 N. W. 886, not in point but upon an analogous question.

Cross references. See further on this question, annotations under Shepherd *v.* Brenton (15 Iowa 84), Vol. II, p. 308; Braddy *v.* Lumery (11 Iowa 29), Vol. I, p. 764.

MANNY & CO. *v.* ADAMS, 32 IOWA 165

1. Attachment and Garnishment—Rights Acquired by Creditor Under—Sale and Delivery of Personal Property by Debtor before Writ Levied or Garnishment Served.—An attaching creditor can acquire no greater right in property attached than was held by the defendant at the time of the attachment.

So where a debtor sells and transfers a note, and suit is brought and judgment is entered by mistake in the name of both the debtor

and the transferee, a subsequent garnishment creditor of the debtor acquires no rights in or to the proceeds thereof, pp. 166, 167.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under *Thomas v. Hillhouse* (17 Iowa.67), Vol. II, p. 495.

MOSER *v.* CROOKS, ADM'R, 32 IOWA 172

1. Limitation of Actions—Action on Open, etc., Account—When Barred.—An action on a current, open, continuous account—one continuously accruing—is not barred in any part, under Sec. 2743 of the Code of 1860, until five years after the date of the last item thereof, pp. 175, 176.

Reaffirmed in *Tubbs v. City of Maquoketa*, 32 Iowa 565, 566; *Carroll v. McCoy*, 40 Iowa 39, 40.

Reaffirmed in *Cedar County v. Sager*, 90 Iowa 14, 57 N. W. 635, under Sec. 2531 of the Code of 1873, corresponding to the section of the text.

Reaffirmed and explained in *Higley & Co. v. B. C. R. & N. Ry. Co.*, 99 Iowa 506, 61 Am. St. Rep. 250, 68 N. W. 830, holding that an open account for items of money paid by reason of overcharges on freight by a railroad company, is within the rule of the text and the Code of 1873 corresponding thereto.

Reaffirmed and explained in *Miller v. Armstrong, Ex'r*, 123 Iowa 87, 98 N. W. 561, holding that an open, current account for board, nursing and attendance is within the rule and the Code of 1897 corresponding thereto.

MULDOWNEY, ADM'X, *v.* ILLINOIS CENTRAL R. R. CO., 32 IOWA 176

(Later Appeals 36 Iowa 462; 39 Iowa 615.)

1. Trial—Evidence—Province of Court and Jury—When Peremptory Instruction Proper—Weight and Sufficiency of Evidence Questions for Jury.—Where there is no evidence, or where essential or integral elements of a cause of action or defense are wholly without proof, the court trying the cause may very properly refuse to allow the case to go to the jury, or it may *direct* the jury as to the verdict to be rendered. But where there is evidence tending in any degree to establish the cause of action or defense, it is error for the court to take the case from the jury or pronounce an opinion upon the sufficiency or weight of the evidence, except in cases where the proof is documentary. It is the peculiar province of the jury to decide questions of fact and weight of evidence and the credibility of the witness, p. 178.

Reaffirmed in *Turner v. Potter*, 56 Iowa 253, 9 N. W. 209; *Meadows v. Hawkeye Ins. Co.*, 67 Iowa 59, 24 N. W. 592; *Gamble v. Mullin*, 74 Iowa 101, 36 N. W. 910; *In re Knox's Will*, 123 Iowa 29, 98 N. W. 470.

Reaffirmed and explained in Way v. Ill. Cent. R. R. Co., 35 Iowa 587; Murphy v. C. R. I. & P. R. R. Co., 45 Iowa 664; Meadows v. Hawkeye Ins. Co., 67 Iowa 59, 24 N. W. 592, holding that it is the duty of the trial court to submit an issue to the jury, even if the evidence only *tends to prove it*, and although he would set the verdict aside as against the weight of the evidence if the jury should decide in favor of the party having the small degree of proof.

Reaffirmed and explained in Murphy v. C. R. I. & P. R. R. Co., 45 Iowa 664, holding that whenever essential or integral elements of a cause of action are wholly without proof, the court may properly refuse to allow the case to go to the jury.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

2. Trial—Instructions—Clearness Required in—Reversible Error.—Upon the trial of a civil action by jury, each party has the right to have the jury instructed upon the law of the case *clearly and pointedly*, so as to leave no ground for misapprehension or mistake; and if the instructions given do not meet this requirement, it is reversible error for the trial court to refuse to give one curing an omission or making the instructions, as a whole, meet it, p. 180.

Reaffirmed in Perry v. Dubuque S. W. Ry. Co., 36 Iowa 105; State v. O'Hagan, 38 Iowa 507; State v. Barrackmore, 47 Iowa 685; Manuel v. C. R. I. & P. R. R. Co., 56 Iowa 657, 10 N. W. 238, holding that the rule applies in both trials by jury of civil actions and criminal prosecutions.

Reaffirmed and extended in State v. O'Hagan, 38 Iowa 507; Overhouser v. Am. Cereal Co., 128 Iowa 586, 105 N. W. 115, holding further that in both civil actions and criminal prosecutions which are tried by the jury, independent of any requests made, the law of the case must be given to the jury, and a failure to do so will be reversible error.

Cross reference. See further on this question, annotations under Rule 2 of Owen v. Owen (22 Iowa 270), ante, p. 30.

3. Negligence—Action for Damages by Reason of—Contributory Negligence—Pleading and Burden of Proof.—In an action for damages for personal injuries or death claimed to have been caused by the negligence of defendant, the plaintiff must aver and prove not only the negligence of the defendant, but that the negligence or want of ordinary care of the person injured or killed did not directly contribute thereto, pp. 178-181.

Reaffirmed in Greenleaf, Adm'r, v. Dubuque & Sioux City R. R. Co., 33 Iowa 59, 60.

Special cross reference. For further cases citing and sustaining the text, and many others, see annotations under Rule 4 of Greenleaf, Adm'r, v. Ill. Cent. R. R. Co., (29 Iowa 14), ante, p. 489; Rule 5 of

Donaldson et al, Adm'rs v. M. & M. R. R. Co. (18 Iowa 280), Vol. II, p. 627

LONG v. BOONE COUNTY, 32 IOWA 181

(Later Appeals 36 Iowa 60.)

1. County Bridges and Roads—Power of County to Issue Warrants for Constructing or Repairing.—Under Sec. 117 of the Code of 1851, the county had an implied power to issue warrants for the constructing or repairing of county bridges and roads, and to levy a tax therefor of not more than one mill on the dollar of the annual tax valuation, p. 183.

Special cross reference. For cases citing the text, and many others, see annotations under Rule 1 of Bell v. Foutch (21 Iowa 119), Vol. II, p. 880.

SPERRY v. HERR, 32 IOWA 184

1. Promissory Note—Negotiability of—Stipulation in Agreeing to Pay Attorney's Fees for Collection Does Not Affect Negotiability.—An agreement in a negotiable note to pay attorney's fees in case the instrument is not paid at maturity and its enforcement is sought at law, does not deprive it of its negotiable character, p. 186.

Reaffirmed, explained and extended in Shenandoah Nat'l Bk. v. Marsh, 89 Iowa 275, 276, 48 Am. St. Rep. 381, 56 N. W. 458, holding that a stipulation in a negotiable note that the maker will pay in addition to the amount thereof, "ten per cent. attorney's fees, if placed in attorney's hands for collection," does not destroy its negotiable character.

Distinguished in Culbertson v. Nelson, 93 Iowa 195, 196, 57 Am. St. Rep. 266, 27 L. R. A. 222, 61 N. W. 856, holding that a stipulation in a bill of exchange to pay exchange, destroys its negotiable character.

STATE v. RATLIFF, 32 IOWA 189

1. Criminal Law—Obstructing Highway—What Not Sufficient to Convict of Offense—Highway Established upon Condition—Failure to Perform—Effect.—Where the order establishing a highway decrees that it be established "when all the legal damages are paid," it is not a highway until the condition is performed, and the owner of the land cannot be convicted of obstructing it before such performance and notice thereof, by failing to remove his fences, pp. 190, 191.

Reaffirmed and extended in State v. Glass, 42 Iowa 57, holding further that when a county road is established upon condition recited in the order therefor that the costs be paid within a given time, the failure to so pay within such period, renders the order of no effect.

Unreported citation 135 N. W. 20.

DEVIN v. HENDERSHOTT, 32 IOWA 192

1. Conveyances—Deed of Trust and Mortgage to or on Land—Rights of Grantee or Mortgagee under Covenants Running with Land.—The grantee in a deed of trust to, or the mortgagee of land is entitled to the benefit of covenants running with the land, pp. 193, 195-197.

Reaffirmed in Porter v. Lafferty, 33 Iowa 257; Rose v. Schaffner, 50 Iowa 486.

Cited in Phillips v. Harrow, 93 Iowa 107, 61 N. W. 438, turning on another question.

FIVECOAT v. FIVECOAT, 32 IOWA 198

1. Divorce and Alimony—Divorce Granted to Husband for Adultery of Wife—Wife Not Entitled to Alimony—Exception to Rule.—As a general rule where a divorce is granted to the husband, on the ground of the adultery of the wife, she is not entitled to alimony out of the husband's estate. But this rule may be subject to exceptions where the husband had acquired property by the wife, or she had been the meritorious cause of it, by a comparative lifetime of industry or otherwise, and he was not without fault respecting her crime, p. 199.

Cited in Hamilton v. McNeill, 150 Iowa 507 (dissenting opinion), 1912 D., Am. & Eng. Ann. Cas. 604, 129 N. W. 492, the majority court opinion not in point.

RAILROAD BANK v. EVANS, 32 IOWA 202

1. Foreign Judgment of Justice's Court—Authentication of—Certificate of Justice's Successor.—The successor in office of a justice of the peace of a foreign state who renders a judgment in an action, may certify such judgment, and such successor's certificate is sufficient proof of the authenticity of the judgment in an action thereon in this state, p. 207.

Reaffirmed in Darrah v. Watson, 36 Iowa 118, applying the rule to the successor of a county clerk in a foreign state.

CLARK v. STOUT, 32 IOWA 213

1. Conveyances—Constructive Notice—Facts Putting Subsequent Purchaser or Incumbrancer upon Inquiry.—A subsequent purchaser or incumbrancer of land is chargeable with notice of a prior recorded mortgage thereon which contains a mistake in description of the property, when the description in the prior mortgage, and other facts and circumstances known to such subsequent purchaser or incumbrancer should have put him upon inquiry, pp. 214, 215.

Special cross reference. For cases citing and sustaining the text, and others on this question, see annotations under Rule 2 of State v. Shaw (28 Iowa 67), ante. p. 439; and see cross references there found.

RUSSELL v. NELSON, 32 IOWA 215

1. **Lands—Action to Quiet Title—Proof Required of Plaintiff—Sec. 3591 of the Code of 1860, Construed.**—Section 3591 requiring that in an action for the recovery of real estate the plaintiff must recover upon the strength of his own title and not upon the weakness of that of his adversary, has no application to an action to quiet title to land, p. 218.

Reaffirmed in English v. Otis, 125 Iowa 558, 101 N. W. 204, under Sec. 4184 of the Code of 1897.

Cited in Moore v. Kleppish, 104 Iowa 322, 73 N. W. 831, the court holding that in an action by one in possession of and claiming title to land to restrain its sale under an execution against another sought to be made the owner by the execution plaintiff, the rule that the plaintiff must recover upon the strength of his own title, etc., if it has application at all, is fulfilled by his showing a presumptive title, that is, such facts from which title may be fairly inferred.

CLARK v. WARNER, 32 IOWA 219

1. **Replevin—Judgment in.**—Under Sec. 3563 of the Code of 1860, a judgment for plaintiff in an action of replevin may be in the alternative, allowing to plaintiff an execution for the specific property, or in case that cannot be obtained, then an execution for its value, p. 219.

Special cross reference. For cases citing, sustaining and explaining the text, and many others on the question, see annotations under Rule 2 of McNorton v. Akers (24 Iowa 369), ante. p. 200.

2. **Trial—General and Special Verdicts—When Special Controls.**—In order for a special verdict to be taken over and defeat the general verdict, they must be manifestly inconsistent, p. 220.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Hardin v. Branner (25 Iowa 364), ante. p. 278.

GILLET v. HILL, 32 IOWA 220

1. **Limitation of Actions—Action Barred by Law of Another State—Pleading and Proof—Demurrer.**—Where defendant relies upon Sec. 2746, as amended by Chap. 167, Acts of 1870 (13th General Assembly), to bar an action herein, on a cause of action arising out of this state, by reason of his residence in another state a sufficient length of time to bar it by the laws of the foreign state, he must plead and prove the facts and the law constituting the bar; and when the answer fails to aver such facts and law of the foreign state it is bad on demurrer, pp. 222, 223.

Cited with approval in Shearer v. Mills, 35 Iowa 502, the court holding that when a petition does not show on its face that the cause of action is barred, it is good on demurrer.

Unreported citation 138 N. W. 877.

2. Limitation of Actions—Non-Residence of Defendant.—

Where a cause of action arises in this state the non-residence of the defendant defeats the bar of the statute of limitation, under Sec. 2745 of the Code of 1860, provided the action is commenced within the statutory period after the defendant again becomes a resident hereof, p. 223.

Reaffirmed and explained in Weaver v. Carpenter, 42 Iowa 349, holding—under Sec. 2533 of the Code of 1873, corresponding to the section of the text—that the statute of limitation will not run in favor of a party against whom a cause of action lies, while he is a non-resident of this state.

HOME INSURANCE CO. v. NORTHWESTERN PACKET CO., 32 IOWA 223,
7 AM. REP. 183

1. Private Corporations—Insurance Companies—Implied Powers.—An insurance company, like all other corporations, is endowed with the usual powers necessary and proper to enable it, as such, to carry out the purposes of its existence, p. 244.

Reaffirmed, explained and extended in Home Savings & Trust Co. v. Fidelity & Deposit Co., 115 Iowa 395, 396, 88 N. W. 821; Vermont Farm Machinery Co. v. De Soto Co-operative Creamery Co., 145 Iowa 494, 122 N. W. 931, holding that every corporation has, by necessary implication, the power to do whatever is necessary to carry into effect the purposes of its creation, unless the doing of the particular thing is prohibited by law or by its charter; that the power given to a corporation by its charter carries with it by implication a grant of the right to use all such powers as a natural person might properly and lawfully use to accomplish the same result under similar circumstances.

Reaffirmed and extended in Vermont Farm Machinery Co. v. De Soto Co-operative Creamery Co., 145 Iowa 494, 122 N. W. 931, holding further that a plea on the part of a corporation that a contract entered into by its officers is *ultra vires*, is only available where the contract is executory, and that, where the consideration for the agreement has been received, the corporation is estopped to allege its want of power to contract.

2. Trial—Special Verdict—On What Not Allowed.—Under Sec. 3079 of the Code of 1860, the court is not authorized to submit a question to the jury for special verdict, when the question involves the very issue in the action; or when the answer thereto will require, not a single statement of a single fact, but a conclusion drawn from many facts, p. 246.

Reaffirmed in Morrow, Gdn., v. Nat'l Masonic Accident Ass'n, 125 Iowa, 638, 101 N. W. 477; Boddy v. Henry & Conover, 126 Iowa

39, 101 N. W. 447; *Haase v. Morton & Morton*, 138 Iowa 211, 115 N. W. 924.

Reaffirmed and extended in *Thomas v. Schee*, 80 Iowa 243, 45 N. W. 541, holding that it is not error to refuse to submit to the jury particular questions not ultimate in their nature, or which could not be well considered or answered without danger or confusion and misrepresentation: And that the court cannot be required to propound to the jury interrogatories which call for the finding of facts not necessarily determinative of the case.

Reaffirmed and extended in *O'Leary Bros. v. German-American Ins. Co.*, 100 Iowa 399, 69 N. W. 689, holding that it is not error for the trial court to refuse to submit interrogatories as to immaterial facts, nor that are not ultimate in their nature, that may not be answered by "Yes" or "No" or in some other brief and pertinent way.

Distinguished in *Taylor v. Wabash Ry. Co.*, 112 Iowa 161, 83 N. W. 893, a case wherein the trial court submitted a question for special verdict contrary to the rule, and the Supreme Court held that it was error without prejudice.

3. Courts—Jurisdiction—"Case" and "Controversy" Defined and Distinguished.—A "case" is a contested question before a court of justice, submitted in the form prescribed by law, which will call into exercise the judicial power; and it is to be so construed in statutes and constitutions conferring jurisdiction on courts. But when the word "controversies" is so used in such an instrument for such purpose it is to be construed as of more general and extensive import, so far as it relates to the occasion for the exercise of power, than the word "cases" used for the same purpose, p. 239.

Reaffirmed and varied in *Clark v. Thompson*, 37 Iowa 540, holding that the expression "controversies and suits" as used in Sec. 784 of the Code of 1860, is so comprehensive that it will include every proceeding, every "controversy" in regard to the rights of the purchaser at a tax sale, wherein evidence may be required or offered.

STATE *v.* ALLEN, 32 IOWA 248

(Case involving the same facts, 32 Iowa 491.)

1. Intoxicating Liquors—Nuisance—Sufficiency of Indictment.—An indictment for nuisance which avers that accused did establish continue and *use* a building for the *purpose* and with the intent of owning, keeping and selling therein intoxicating liquor, contrary to law, and did sell "then and there" intoxicating liquors, is sufficient, p. 249.

Cited in *State v. Clark*, 141 Iowa 301, 119 N. W. 721, not in point.

Special cross reference. For further cases citing and sustaining the text, see annotations under Rule 2 of *State v. Freeman* (27 Iowa 333), ante. p. 409.

FREDERICK v. SHANE, 32 IOWA 254

1. Condemnation of Land for Public Purposes—Damages—
Sec. 18, Art. 1 of the Constitution, Construed.—Sec. 18, Art. 1 of the Constitution of 1857, providing that in estimating the damages to a land owner by reason of land taken for a public purpose, the jury “shall not take into consideration *any advantage that may result to said owner on account of the improvement for which it is taken,*” applies to all condemnation proceedings for the taking of private property for any such purpose allowed by law, pp. 256, 257.

Reaffirmed in Haggard v. Indep. Sch. Dist. of Algona, 113 Iowa 495, 85 N. W. 780.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

PHILLIPS v. OYSTEE, 32 IOWA 257

1. Fences — What Lawful — Sec. 1544 of the Code of 1860, Construed.—Although Sec. 1544 of the Code of 1860, describes the kind of fence which is lawful, yet any other fence of equal structure and strength with that therein described, is lawful thereunder, p. 259.

Reaffirmed in Hilliard v. C. & N. W. Ry. Co., 37 Iowa 445.

STATE v. DOUGHERTY, 32 IOWA 261

1. Contempt—Punishment for by Court—What Record Must Show.—Where a person is ruled and required by a court to appear and show cause why he should not be fined for contempt in disobeying the orders of the court, his response thereto is adjudged insufficient and he is fined, the record must (under Sec. 2694 of the Code of 1860) show the nature of the contempt, the facts on which it is founded, or the judgment will be reversed upon appeal, p. 261.

Reaffirmed and explained in Lutz v. Aylesworth, 66 Iowa 632, 633, 24 N. W. 146, holding that where a witness is fined for contempt in refusing to answer a question propounded, and the notes of the stenographic reporter is afterwards transcribed, filed and preserved, it is a sufficient compliance with Sec. 3497 of the Code of 1873, requiring a statement of facts on which the commitment is founded to be preserved.—But see *State ex rel Aldrich v. Dist. Court, Whitaker, Judge*, 133 Iowa 452, 110 N. W. 593, (reaffirming the text) holding that the filing of such notes not transcribed is insufficient, the judgment fining for contempt in such case is void, and will be reversed upon appeal.

Reaffirmed and explained in State v. Dist. Ct. of Taylor County, 124 Iowa 190, 99 N. W. 713, holding that the record in a contempt proceeding must show either the facts or the evidence upon which the court acted, or the order finding for contempt will be reversed on appeal.

Reaffirmed, explained and varied in State v. Folsom, 34 Iowa 584 (abstract), holding that where contempt proceedings do not state the

evidence or the facts upon which the order fining for contempt is founded, and the warrant of commitment does not state the facts, or whether they were within the knowledge of the court or proved by witnesses, *Certiorari* will lie from the Supreme Court in favor of the person fined.

(Note.—There are other cases to the same effect as the rule, but not citing it.—Ed.)

STATE *v.* HIGDON, 32 IOWA 262

1. Criminal Law—Seduction—Evidence—Character of Artifices Necessary to Have Been Used to Constitute the Crime.—Upon the trial of an indictment for seduction the kind of seductive arts necessary to have been employed by accused in order to make out the crime, cannot be defined. Every case must depend upon its own peculiar circumstances, together with the condition in life, advantages, age, and intelligence of the parties, p. 263.

Reaffirmed in State *v.* Hayes, 105 Iowa 85, 74 N. W. 758; State *v.* Hughes, 106 Iowa 127, 128, 68 Am. St. Rep. 288, 76 N. W. 520; State *v.* Donovan, 128 Iowa 146, 147, 102 N. W. 791.

2. Criminal Law—Seduction—Character of Prosecutrix—Presumption as to Her Chastity—Burden of Proof.—Upon the trial of an indictment for seduction the prosecutrix will be presumed to have been of chaste character prior to the time of the alleged commission of the crime, and the burden is on the accused to prove her want of chastity previous thereto, p. 264.

Reaffirmed in State *v.* Bowman, 45 Iowa 419.

Unreported citation, 78 N. W. 682.

OSGOOD *v.* BRINGOLF, 32 IOWA 265

1. Evidence—Res Gestae—Declarations and Admissions of Agent as.—Declarations and admissions of an agent in order to bind and be receivable in evidence against the principal, as part of the *res gestae*, must be made during the continuance of the agency, and in regard to a transaction then depending or uncompleted: If made by the agent after the termination of the agency, or after the completion of the transaction, they are inadmissible against the principal, p. 268.

Reaffirmed in Harrison County *v.* State Savings Bank, 127 Iowa 245, 103 N. W. 122.

Reaffirmed and explained in Metropolitan Nat'l Bank *v.* Commercial State Bank, 104 Iowa 689, 74 N. W. 28, holding that the admissions and representations of an agent are not competent evidence against the principal, unless made with respect to a matter within the scope of his authority, in reference to the subject-matter of his agency, and at the time of the transaction to which they refer, and while engaged in it, or so soon thereafter as to be virtually a part of it: That statements that are mere narration of a past event are not competent.

Cross reference. See further on this question, annotations under Rule 3 of *Sweatland v. Ill. & Miss. Telegraph Co.* (27 Iowa 433), ante. p. 421.

2. Appeal—Error in Instructions—Imperfect Record—Review.—Where upon appeal to the Supreme Court the record does not contain and set out all the instructions given to the jury, error in the giving or refusing instructions, when those shown by the record as having been given are correct, will not be reviewed or be ground for reversal, p. 269.

Reaffirmed in *Moody v. St. P. & S. C. R. R. Co.*, 41 Iowa 285, 286.

(Note.—There are other cases sustaining but not citing the text.—Ed.)

3. Written Contracts—Meaning of Words “Value Received” in.—The words “value received” when used in a written contract do not necessarily import a consideration in money, and a promise to pay may legally be the consideration, without any money passing, p. 270.

Cited in *Culbertson v. Nelson*, 93 Iowa 197, 198, 57 Am. St. Rep. 266, 27 L. R. A. 222, 61 N. W. 857, the court holding that the words “value received” in a written instrument express only what the law must imply from the nature of the instrument, and the relations of the parties apparent upon it; and that such words do not, alone, render a bill or note negotiable.

4. Pleading—Payment—Evidence—Burden of Proof.—In an action for money due on a contract when the defendant admits the contract and pleads payment in his answer, the burden is on him to prove the payment, p. 269.

Distinguished in *Sewell & Son v. Mead*, 85 Iowa 345, 52 N. W. 228, holding that where the owner of cattle sues an agister for breach of contract and for a sum of money claimed to have been paid under protest to obtain their possession and the release of the agister's lien, and the defendant answers admitting the payment but averring that it was in full settlement, the burden is on plaintiff to prove the payment to have been made as claimed by him.

MORRISON v. HERSHIRE, TREASURER, 32 IOWA 271

1. Municipal Corporations—Street Improvements—Collection of Special Tax for.—Under Chap. 14, Acts of 1870 (13th General Assembly), a municipal corporation organized under Chap. 51, Code of 1860, may have its taxes collected by the county treasurer *as he collects county taxes*, upon the corporation complying with Sec. 3, Chap. 25, Acts of 1864 (10th General Assembly) and having them certified to the proper county officer and placed upon the county tax books. And this rule applies to special taxes for street improvements, pp. 274, 275.

Reaffirmed in Fitzgerald v. Sioux City, 125 Iowa 400-403, 101 N. W. 270, under the provisions of the Codes of 1873 and of 1897.

Cited in Cassidy v. Hammer, 62 Iowa 360, 17 N. W. 588, not in point, but upon analogy.

2. Municipal Corporations—Street Improvements—How Special Tax for May be Levied.—Under Chap. 51, Code of 1860, a special tax for the improvement of streets may be levied either by ordinance or by resolution passed by the city council; and Chap. 65, Acts of 1870, does not restrict this power, pp. 273-275.

Cited in State v. Brandt, 41 Iowa 614, not in point.

Partially overruled in Risdon v. Shank, 37 Iowa 83, 84, holding that Chap. 45, Acts of 1872 (14th General Assembly) repeals Sec. 1064 of Chap. 51 of the Code of 1860 and Chap. 65, Acts of 1870.

3. Municipal Corporations—Grading and Macadamizing Less Than the Entire Width of Street.—A city may in the exercise of a proper discretion and acting for the public interest, and in the absence of wanton oppression to individuals, provide for the grading and macadamizing of a portion of a street of a less width than the whole, and for the assessment of the cost thereof against abutting lot owners, p. 276.

Reaffirmed and explained in Coates v. City of Dubuque, 68 Iowa 552, 27 N. W. 751, holding that the question whether an improvement is demanded by the public wants or necessity is to be determined by the city council, and their determination is conclusive, except for want of authority or for fraud or oppression.

Reaffirmed and explained in Brown v. Barstow, 87 Iowa 346, 54 N. W. 241, holding that the location of a street crossing is a matter within the discretion of the city council, and that courts cannot interfere with or control that discretion, except in case of want of authority, or for fraud or oppression; and that it is within the discretion of the city council to determine when, and at what points, street crossings shall be constructed.

Reaffirmed and varied in Saunders v. Iowa City, 134 Iowa 139, 147, 9 L. R. A. (New Series) 392, 111 N. W. 531, holding that in the exercise of its discretion and in good faith and where there is perfect fairness and no oppression, a city may select a patent article or composition out of which a pavement is to be constructed.

Cited in Dewey v. City of Des Moines, 101 Iowa 423, 70 N. W. 607; Allen v. City of Davenport, 107 Iowa 103, 77 N. W. 537, the court holding—as does the present case—that the improvement of a street is for the benefit of the public, and that the benefit or disadvantage to abutting lot owners will not be considered in determining the validity of an assessment therefor.

Distinguished and narrowed in City of Muscatine v. Ch. R. I. & P. Ry. Co., 88 Iowa 294-296, 55 N. W. 101, holding that where the special charter of a city confers the power upon it to cause its streets

to be paved, and to require owners of adjacent lots to pave one-half in width of the street contiguous to their respective lots, then the charter and Secs. 466 and 479 of the Code of 1873 when construed together confers only the authority to require owners of lots on each side of the street to do or pay for one-half of the paving for the portion of the street contiguous to their lots, whether the paving covers a part only or the full width of the street, and whether the paving is in the center of the street or on one side.

Cross reference. See further on this question, annotations under *Warren v. Henley* (31 Iowa 31), ante. p. 644.

4. Taxation—Illegal Taxes—Part Legal and Part Illegal—Injunction—Tender of Legal Taxes.—Where an apportionable part of taxes levied are illegal and the rest legal, the tax payer cannot enjoin without tendering or offering to pay the part which is legal, p. 278.

Reaffirmed in *Grimmell v. City of Des Moines*, 57 Iowa 149, 10 N. W. 332; *Allen v. City of Davenport*, 107 Iowa 101, 77 N. W. 536.

Reaffirmed and varied in *Byers v. Odell*, 56 Iowa 619, 10 N. W. 103, holding that a person cannot enjoin the collection of a judgment which is void for want of jurisdiction of the court rendering it, without tendering or offering to pay the amount shown by his petition to be due the creditor, or offering to allow judgment to be entered therefor.

Reaffirmed and varied in *Fisk v. City of Keokuk*, 144 Iowa 193, 194, 122 N. W. 899, holding that when taxes for which property is sold is legally levied and assessed, the owner thereof cannot set aside the sale or certificate of purchase without tendering or offering to pay the amount of the assessment, with the legal interest.

Cited in *Reiger v. Turley*, 151 Iowa 499, 124 N. W. 879; *Richardson v. Roberts*, 148 Iowa 347, the court holding that a court of equity may grant relief requiring the party to whom it is granted to do equity, or to perform equitable conditions, thus effectuating justice.

Unreported citation 131 N. W. 869.

5. Taxation—Irregularities in Levy or Apportionment—Injunction Not Allowed for.—A tax payer cannot enjoin the collection of taxes for more irregularities in the level or apportionment thereof, p. 279.

Reaffirmed in *Taylor v. McFadden*, 84 Iowa 270, 50 N. W. 1072; *Reed v. City of Cedar Rapids*, 138 Iowa 368, 116 N. W. 141.

Cross reference. See further on this question, annotations under *Macklott v. City of Davenport* (17 Iowa 379), Vol. II, p. 541.

AMSDEN v. DUBUQUE & SIOUX CITY R. R. CO., 32 IOWA 288

1. Res Adjudicata—Trial of Plea of—Identity of Causes of Action a Question for Jury.—Upon the trial of an action at law where the defense is a former adjudication of the same subject-matter

between the same parties, the identity of the causes of action is a question for the jury to determine from the evidence, p. 292.

Reaffirmed and extended in Munn v. Shannon, 86 Iowa 367, 53 N. W. 265, holding further that in a case as in the text, the burden is on defendant to prove the identity of the causes of action, and that the former action was determined on its merits.

Distinguished and narrowed in Hempstead v. City of Des Moines, 52 Iowa 306, 307, 3 N. W. 127, holding that issues and facts of record must, as to their identity be determined by the court, and the jury be instructed as to the effect thereof upon a plea of *res adjudicata*.

SHEPARD v. PRATT, 32 IOWA 296

1. Estoppel—Admissions—Statement in Pleading in Former Action.—A statement in a pleading in a former action between the same parties, which action was dismissed before the trial, does not estop the party pleading from claiming to the contrary in a subsequent action, but is only an admission which is capable of explanation; such as mistake, etc., p. 299.

Reaffirmed and explained in Iowa County v. Huston, 43 Iowa 487, holding that a statement or admission of fact in a petition on which pleading issue is joined and a trial had, resulting in a failure of the jury to agree, does not constitute an estoppel, thereby preventing the plaintiff from amending the pleadings, and proving to the contrary on another trial, but it does amount to a solemn admission of fact which the plaintiff must overcome by testimony on the second trial.

Cited in Woodward v. Jackson, 85 Iowa 437, 52 N. W. 359, the court holding that the right of an intervenor to dismiss his petition of intervention at any time before judgment, is well settled; Nor will he be estopped by the judgment afterwards rendered in the case from subsequently litigating the same subject-matter.

2. Fraudulent Conveyances—Husband Paying Purchase Money of Land and Conveyance Made to Wife, When Not Fraudulent.—Where a husband who is solvent pays the purchase price of land and, without fraudulent intent, causes the deed to be made to his wife in satisfaction of a debt due by the former to the latter, it will not be held to be fraudulent or invalid, pp. 300, 302.

Reaffirmed in Everist v. Pierce, 107 Iowa 45, 77 N. W. 508, holding that a solvent husband may convey land to his wife as a gift.

Cited in Emidon v. Snouffer, 139 Iowa 162, the case involving a resulting trust.

Cross reference. See in this connection, annotations under Lyman v. Cessford (15 Iowa 229), Vol. II, p. 330.

HILL v. BAKER, 32 IOWA 302, 7 AM. REP. 193

1. Judicial and Execution Sales of Land—What Irregularities Do Not Affect Validity—Appraisement—Appraiser Not a House-

holder, Effect.—Mere irregularities in proceedings and sale of land under execution not affecting the power of the sheriff to make the sale, do not render the sale void.

This rule applies where one of the appraisers of land sold under execution is not a householder as provided by Sec. 3362 of the Code of 1860; and the sale is not void for such reason, pp. 305, 307.

Reaffirmed as to first paragraph in Davis v. Spaulding, 36 Iowa 614; Brown v. Butters, 40 Iowa 547; Preston v. Wright, 60 Iowa 354, 14 N. W. 353.

Distinguished in Woods v. Cochrane and Smith, 38 Iowa 485, 486, holding that where one of the appraisers who appraises land sold under execution is not a householder, lives thirty-five miles from the land, and is selected by the plaintiff in execution, or his agent and his attorney, and the land is appraised at less than one-half its real value, and is purchased by the execution plaintiff, the execution defendant (debtor) may be permitted to redeem from such sale as against the plaintiff, purchaser, within a reasonable time after the sale (in this case seven months).

2. Judicial and Execution Sales of Several Parcels of Land in Gross—When Not Cause for Setting Aside.—Where several parcels of land levied on under execution are offered for sale separately, and, upon no bids being received for any tracts, it is then sold in gross for a lump sum, the sale in gross is not a ground for setting aside the sale and deed made thereunder, in an action in equity for such purpose, p. 307.

Special cross reference. For cases citing and extending the text, and others, see annotations under Rule 1 of Burmeister v. Dewey (27 Iowa 468), ante. p. 424.

3. Judicial and Execution Sale of Land—Gross Inadequacy as Ground for Setting Aside—Innocent Purchaser from Execution Sale Purchaser.—Gross inadequacy in purchase price of land sold under execution is not alone sufficient to set aside the sale after the land has passed into the hands of an innocent purchaser from the execution sale purchaser, pp. 307, 308.

Special cross reference. For cases citing and narrowing the text, see annotations under Rule 2 of Wallace v. Berger (25 Iowa 456), ante. p. 285.

4. Attachment of Land—Judgment in Action—Date Lien of Judgment Attaches.—Where land is levied on under an attachment and a judgment is thereafter rendered in the action sustaining the attachment and ordering the land sold for the debt, the lien of the judgment attaches as of the date of the levying of the writ, p. 311.

Reaffirmed in Howard v. Traer, 47 Iowa 702 (abstract).

MESSER v. REGINNITTER, 32 IOWA 312

1. Lands—Boundaries—Evidence—Plat—Testimony of Surveyor, Opinions, etc., of—Where in an action involving boundary lines of adjoining land owners one of the parties introduces a plat of a surveyor, the surveyor who made the survey and plat may thereupon, after identifying the plat, testify that it is correct, and explain it and the exact boundary of the parties and the location of buildings, fences, etc., in reference thereto, pp. 313, 314.

Reaffirmed in Goldsboro v. Pidduck, 87 Iowa 601, 602, 54 N. W. 432.

SCHOFIELD v. IOWA HOMESTEAD CO., 32 IOWA 317, 7 AM. REP. 197

1. Conveyances—Covenants—Covenant of Seizin Runs with Land—Rights of Last Grantee under.—A covenant of seizin in a conveyance of real estate runs with the land and confers a right of action for its breach upon the grantee or assignee of the grantee in the deed, or on the last person claiming title under or through the latter (or grantee in the deed), pp. 318, 319.

Reaffirmed in Frederick v. Callahan, 40 Iowa 313; Boon v. McHenry, 55 Iowa 204, 7 N. W. 503.

Cited with approval in Knadler v. Sharp, 36 Iowa 237, the court holding that a covenant against incumbrances in a deed, runs with the land.

2. Pleading—Evidence—Onus Probandi—Action for Breach of Covenant of Seizin.—Where in an action for breach of covenant of seizin, the defendant avers in his answer that at the time of the execution of the deed he was the holder of a good title to the land, the burden is on him to establish such title.

So where in such action the plaintiff avers that defendant was not the true, the lawful and rightful owner of the premises; nor had defendant good right and lawful authority to sell and convey the same, and the defendant in his answer denies that he was not the true and lawful owner of said land nor had good right and lawful authority to sell and convey the same, the denial of the defendant amounts to an affirmation of his title and casts the burden of proof upon him, pp. 321, 322.

Reaffirmed in Blackshire v. Iowa Homestead Co., 39 Iowa 625; Boon v. McHenry, 55 Iowa 203, 6 N. W. 55.

Distinguished in Jerald v. Elly, 51 Iowa 323, 1 N. W. 640, holding that when in an action for breach of covenant against incumbrances the plaintiff alleges the existence of an incumbrance and the defendant denies its existence, the burden of proof is on the plaintiff.

BELZOR v. LOGAN & CANFIELD, 32 IOWA 222

1. Actions—Practice—Dismissal without Prejudice or Non-Suit—When Allowed—Submission to Referee—Referee Not Court.—Under Sec. 3127 of the Code of 1860, the plaintiff may dismiss

his action without prejudice or take a non-suit, at any time before the final submission to the jury, or to the court, when the trial is by the latter; and this provision will be construed to be a denial of such right after such time.

But a referee is neither a court or jury within the meaning of the statute, and plaintiff may dismiss his action or take a non-suit after final submission of the case to such officer, but before he has filed his report, pp. 323, 324.

Reaffirmed as to first paragraph in McArthur v. Schultz, 78 Iowa 367, 43 N. W. 224, under Sec. 2844 of the Code of 1873, corresponding to the section of the text.

Reaffirmed and explained as to first paragraph in Morrissey v. Ch. & N. W. Ry. Co., 80 Iowa 315, 45 N. W. 545, under Sec. 2844 of the Code of 1873 corresponding to the section of the text, and holding that a submission is final only when nothing remains to be done to render it complete, and that submission to a jury is not final until the last words of the charge are read, and the jury directed to consider their verdict.

Cited with approval as to second paragraph in Young v. Scoville, 99 Iowa 181, 68 N. W. 671; Doyle v. Duckworth, 149 Iowa 628, 129 N. W. 61, the cases turning upon another question.

Unreported citation 136 N. W. 933.

COLLINS v. CITY OF COUNCIL BLUFFS, 32 IOWA 324, 7 AM. REP. 200

(Later Appeal 35 Iowa 432.)

1. Municipal Corporations—Duty to Keep Streets in Repair—Accumulation of Snow and Ice—Negligence of City—Damages.—

It is the duty of a city to keep its streets in repair and free from dangerous obstructions; and for a negligent failure to perform this duty it is liable in damages for injuries thereby occasioned.

So the negligent permitting an obstruction in a street, from snow and ice being deposited there from natural causes, whereby injury results to a traveler, will render the city liable, pp. 327-329.

Reaffirmed as to first paragraph in Cutter v. City of Des Moines, 137 Iowa 645, 646, 113 N. W. 1082; Parmenter v. City of Marion, 113 Iowa 299, 300, 85 N. W. 90, under Sec. 753 of the Code of 1897.

Reaffirmed as to second paragraph in Huston v. City of Council Bluffs, 101 Iowa 38, 69 N. W. 1130, 36 L. R. A. 211.

Reaffirmed and explained as to second paragraph in Templin v. City of Boon, 127 Iowa 93, 102 N. W. 790, holding that the mere fact that a sidewalk is dangerous because of the presence of ice and snow is not sufficient to establish negligence on the part of the city, even though this snow and ice are not removed within a reasonable time: But where, by reason of travel or the action of the elements, it becomes rounded or worn into ridges, uneven and irregular, due care on the

part of the city may demand its removal: And that if the city be negligent in allowing ice and snow upon its sidewalks to become and remain in a dangerous and unsafe condition, it cannot avoid liability for injuries received therefrom, by showing that the iciness or slippery condition of the walk was caused by natural causes, as by rain or sleet or sudden changes of the weather.

Cited in Sankey v. Ch. R. I. & P. Ry. Co., 118 Iowa 43, 44, 91 N. W. 821, the case turning upon an analogous question.

Cited in Davis v. Allamakee County, 40 Iowa 218, not in point but upon analogy.

Cross reference. See further on this question, annotations under Rowell v. Williams (29 Iowa 210), ante. p. 515.

2. Negligence—Personal Injuries Caused by—Duty of Person Injured as to Employing Physician or Surgeon—Damages—Trial—Instructions.—Upon the trial of an action for damages for personal injuries claimed to have been occasioned by the negligence of defendant, an instruction is proper, where justified by the issue and evidence, that it was incumbent upon plaintiff "to make use of reasonable means to effect as speedy and complete a cure as could reasonably be accomplished under all the circumstances; that if she neglected so to do and her injuries have been aggravated thereby, she ought not to recover for injuries occasioned by such neglect: But if in the selection of a physician, and the use of other means for effecting a cure, she used reasonable and ordinary care, her damages should not be diminished, notwithstanding you may find that, by more skillful treatment, her sufferings might have been alleviated and her condition improved," pp. 329, 330.

Reaffirmed in Allender v. C. R. I. & P. R. R. Co., 37 Iowa 269; Rice v. City of Des Moines, 40 Iowa 644.

Reaffirmed and varied in Hendershott v. Western Union Tel. Co., 106 Iowa 539, 68 Am. St. Rep. 313, 76 N. W. 831, holding that the owner of a domestic animal cannot recover for its death caused by the negligence of another, if his own negligence or his failure to have it properly cared for by a veterinary surgeon directly tended to cause its death.

3. Negligence—Action for Personal Injuries—Evidence of Permanency—Damages—Measure of—Future Suffering.—In an action for negligence resulting in personal injuries where the evidence shows that the injuries are permanent, the jury may, in estimating damages, consider the age, condition of health and manner of life of the plaintiff, and the permanency of the injuries sustained, p. 330.

Reaffirmed and extended in Fry v. D. & S. W. Ry. Co., 45 Iowa 417; Jordan v. Cedar Rapids & Marion City Ry. Co., 124 Iowa 182, 183, 99 N. W. 695, holding further that in an action for painful personal injuries whether temporary or permanent, the jury may, in esti-

inating damages, consider future suffering which the evidence shows that it is reasonably certain will be caused to plaintiff thereby.

4. Negligence—Excessive Damages—When Judgment Reversed or Reduced upon Appeal for.—Upon an appeal from a judgment for plaintiff for damages for personal injuries (or death) caused by defendant's negligence, the Supreme Court will not order a *remittitur* or reverse the judgment because the verdict is excessive, unless it is so flagrantly excessive as to raise a presumption that it was the result of passion, prejudice or undue influence, and not the result of an honest exercise of the judgment and the lawful discretion of the jury.

So a judgment and verdict for \$15,000 for injuries to a married woman where the evidence shows that her sufferings were terrible and protracted, and that because of them she was made a helpless cripple for life, being before the injuries an active and useful woman, will not be disturbed upon appeal, as excessive, pp. 331-333.

Reaffirmed as to first paragraph in Deppe v. C. R. I. & P. R. R. Co., 38 Iowa 598, upholding a verdict for plaintiff of nine thousand dollars in an action for personal injuries, resulting from the negligence of a railroad company, where plaintiff sustained an injury that disabled him for life, and deprived him of ability to labor, upon which he was dependent for support, the bone of his thigh was crushed, he received severe internal injuries, his sufferings were protracted and most intense, having to endure for seven weeks the excruciating torture of machinery and appliances used by surgeons to prevent shortening of his limb, and which, however, proved unavailing.

Reaffirmed as to first paragraph in Rose v. Des Moines Valley R. R. Co., 39 Iowa 257, a case wherein a verdict and judgment for \$10,000 for the death of a man was held excessive under the facts of the case, to all in excess of five thousand dollars and a *remittitur* was ordered to that amount upon appeal.

Reaffirmed as to first paragraph in Belair v. C. & N. W. Ry. Co., 43 Iowa 676, 677, a case wherein a verdict for \$11,000 was held not excessive, for personal injuries permanently disabling a young man, thirty years of age, from pursuing an employment in which he was earning \$540 a year, and in which there was a regular system of lucrative promotions, and where the physicians testified that the injuries would probably shorten his life, and the jury returned a special verdict that the degree of the plaintiff's disability was nine-tenths.

Reaffirmed as to first paragraph in Artz v. C. R. I. & P. R. R. Co., 44 Iowa 290, 291, the court upholding a verdict for plaintiff of seven thousand one hundred dollars in an action for personal injuries, resulting from the negligence of a railroad company, the facts as to the nature of the injuries not being given.

Reaffirmed as to first paragraph in Kroener v. C. M. & St. P. Ry. Co., 88 Iowa 26, 55 N. W. 31, a case wherein a verdict for \$12,000 for the loss of one foot by plaintiff who was twenty years of age and

was earning \$60 per month; was held excessive in all except \$8,000, and a *remittitur* was ordered in the Supreme Court to that extent.

Reaffirmed as to first paragraph in Wimber v. Iowa Central Ry. Co., 114 Iowa 557, 558, 87 N. W. 507, a case wherein a verdict for \$14,500 for the loss of a leg, six inches below the knee, by a man thirty-nine years old, was held excessive except as to \$8,000 and a *remittitur* to that extent was ordered in the Supreme Court.

Reaffirmed as to first paragraph in Jordan v. Cedar Rapids & Marion City Ry. Co., 124 Iowa 183, 99 N. W. 695, a case wherein a verdict for \$4,000 for permanent personal injuries which greatly reduced the earning capacity of an active, energetic man of fifty-four years of age, who at the time of the accident made money out of his business, was held not to be excessive.

WHITE v. BUTT, ADM'R, 32 IOWA 335

1. **Statute of Frauds—Parol Contract for Sale of Real Estate—Possession Taken under by Purchaser—Effect.**—A parol contract for the sale of real estate where the purchaser takes possession thereof thereunder with the knowledge or assent of the vendor, or where the purchaser pays a part of the purchase money, is not within the Statute of Frauds, under Sec. 4008 of the Code of 1860, pp. 338, 339.

Reaffirmed in Benbow v. Boyer, 89 Iowa 498, 56 N. W. 545, the case involving other questions also, closely connected with this subject.

FISHER v. BEARD, 32 IOWA 346

(Later appeal 40 Iowa 625.)

1. **Lands—Dedication to Public Use—How May be Made—Public Grounds in City—Plat for—Rights of Purchasers from Dedicator—Injunction.**—When the owner of lands lays out a town thereon, and sells lots to purchasers with reference to the plat thereof, the purchasers of such lots acquire, as appurtenant thereto, a vested right in and to the use of adjacent grounds, designated as public grounds on such plat, to the full extent such designation imports, which right cannot be divested by the owner making the dedication nor by the town in its corporate capacity. And where lots have been sold with reference to such plat before the same is changed, the rights of purchasers cannot be affected, without their assent, by any subsequent change in the designation of the square.

Injunction lies upon complaint of such purchaser to restrain any such public property being diverted from the use for which it was so dedicated either by the dedicator or by the city, p. 352.

Reaffirmed in City of Keokuk v. Cosgrove, 116 Iowa 193, 89 N. W. 984, holding the rule applies as against the dedicator and all those claiming through him.

Reaffirmed and explained in Cleaver v. Mahanke, 120 Iowa 79, 94 N. W. 280, holding that where land has been divided into lots, and a

plat thereof is made showing such lots and the streets, and the owner sells lots so designated on the plat, the purchaser has an easement in such streets as are necessary for the full enjoyment and use of his property, of which the grantor cannot deprive him.

Distinguished in Williams v. Carey, Mayor, 73 Iowa 196, 197, 34 N. W. 814, holding that injunction will not lie in favor of an abutting owner against a city to prevent it from vacating twelve feet of a street, where the street so vacated or narrowed is forty-one feet wide, and no material damage is shown as resulting to such abutting lot owner.

Distinguished in McLaughlin v. Town of Gray, 105 Iowa 262, 263, 77 N. W. 774, holding that in the absence of fraud or bad faith, injunction does not lie in favor of an abutting lot owner to restrain a city from vacating a part of a highway within its limits; that in such case the lot owner's remedy is by *Certiorari*.

Cross reference. See further on this question, annotations under Warren v. Mayor of Lyons City (22 Iowa 351), ante. p. 39; Leffler v. City of Burlington (18 Iowa 361), Vol. II, p. 649.

2. Parol Dedication of Land for Public Use—Evidence to Establish Dedication.—Dedication of land to public use may be by parol, and may be proved by oral declarations or by acts of the owner, followed by public enjoyment of the property for a long or short time, pp. 352, 354.

Reaffirmed and explained in Youngerman v. Brd. of Supervisors of Polk County, 110 Iowa 734, 81 N. W. 167, holding that in order to constitute a dedication, the intention to dedicate must have existed at the time thereof; and that in determining the question of intention, the acknowledgment will be considered in connection with the plat, the certificate of survey, and such circumstances as may throw light upon the transaction: Holding further that where land is reserved by the dedicator, the fee simple title remains in him.

Reaffirmed and explained in Snouffer v. C. R. & M. City Ry. Co., 118 Iowa 296, 297, 92 N. W. 83, holding that dedication of realty to public use may be accomplished without any deed or formal act by the dedicator, and without any formal declaration of acceptance by the public authorities; and the dedication may be shown by the verbal declarations of the owner, by his act in filing the plat, by his silence in the face of known adverse possession by the public, or by any other act or omission from which the intention to dedicate may fairly be inferred; while acceptance may also be inferred from general use of the way by the public, or by the improvement and repair of the way by the authorities having care and control of the highways.

Reaffirmed and extended in State v. Birmingham, 74 Iowa 410, 411, 38 N. W. 122, 123, holding further that to constitute a highway by prescription the road must have been occupied and used by the public under a claim of right to it as a highway, with the knowledge of

the owner of the land, for a period of more than ten years: But that the dedication may be shown by writing, by declaration, or by conduct of the land owner; and if he knows for a series of years that the public is using and treating a road as a highway, expending funds in its improvement and he acquiesces therein, this is evidence of an actual dedication.

Cross references. See further on this question, annotations under *Manderschid v. City of Dubuque* (29 Iowa 73), ante. p. 499; *Morrison v. Marquardt* (24 Iowa 35), ante. p. 145.

KROY, ADM'X, v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co., 32
IOWA 357

1. Master and Servant—Railroads—Negligence—Contributory Negligence—Assumption by Employe of Dangers by Defective Machinery and Negligence of Fellow Servant—Dangerous Customs.—If a servant knows that a fellow servant is habitually negligent, or that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risk occasioned thereby.

Where an employe operating a railroad train aids in establishing or consents to a dangerous custom, he is guilty of contributory negligence and the company is not liable in damages by reason of his injury or death thus caused, pp. 361-363, 366.

Reaffirmed in *Contri, Adm'r, v. Hollingsworth Coal Co.*, 143 Iowa 119, 120, 121 N. W. 508.

Reaffirmed and explained in *Money v. Lower Vein Coal Co.*, 55 Iowa 673, 8 N. W. 653, holding that if a miner knew, or by the exercise of ordinary care might have known, of the unsafe condition of the roof, and he continued to work in the dangerous place without protest or complaint, without being induced to believe that a change would be made, he assumed the risk for injuries thereby occasioned, and cannot recover therefor.

Reaffirmed and explained in *Huggard v. Glucose Sugar Refining Co.*, 132 Iowa 733, 109 N. W. 479, holding that any notice by the employe so long as it plainly conveys to the master the idea that the defect exists, and that the employe desires its removal, is sufficient.

Reaffirmed, explained and extended in *Perigo v. C. R. I. & P. R. Co.*, 52 Iowa 277, 3 N. W. 44; *Wells v. B. C. R. & N. R. R. Co.*, 56 Iowa 524, 9 N. W. 366; *Patton v. Cent. Iowa Ry. Co.*, 73 Iowa 309, 310, 35 N. W. 151, holding that an employe who knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have

assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby.

Reaffirmed as to first paragraph in Way v. Ill. Cent. R. R. Co., 40 Iowa 344.

Reaffirmed and explained as to first paragraph in Greenleaf, Adm'r, v. D. & Sioux City R. R. Co., 33 Iowa 58, holding that the servant does not, by simply remaining in the employ of his master, with knowledge of defects in the machinery which he is obliged to use, assume the risks attendant upon the use of such machinery: That such results follow, only, when he remains in the master's service without objection or protest against the continuance of the defects.

Reaffirmed and explained as to first paragraph in Muldowney, Adm'r, v. Ill. Cent. Ry. Co., 36 Iowa 470, 471, holding that it is the duty of the master to exercise reasonable and ordinary care to provide safe and suitable machinery, and he is liable for injuries to the servant caused by defects therein which reasonable and ordinary diligence would have discovered: Unless the servant after he had knowledge of such defects continued to use the machinery without objection, in which case he (the servant) assumes the risk.

Reaffirmed, explained and extended as to first paragraph in Muldowney v. Ill. Cent. R. R. Co., 39 Iowa 619-621, holding that when an employe has knowledge, or has the means of acquiring knowledge by the exercise of ordinary care and diligence, of the defects or imperfections in the machinery or cars about or upon which he is employed, and continues in his employer's service without objecting to, or protesting against the use of such defective or imperfect cars or machinery, he will be held to have assumed all the risks incident to the use of the cars and machinery in such defective condition.

Reaffirmed and extended as to first paragraph in Brann v. C. R. I. & P. R. R. Co., 53 Iowa 597, 599, 36 Am. Rep. 243, 6 N. W. 6, holding further that it is the duty of a railroad company to use ordinary care to see that cars are fit to be used, and that what constitutes such care, is to be measured by the character of the business, and the risks attending its prosecution; and that if an employe was injured by reason of a car being out of repair, it is for the jury to say, in an action for damages therefor, whether the defendant (railroad company) by the use of ordinary care could have discovered the defect; and that when an accident occurred because of defective appliances to a car, the railroad company when sued, must show that in the selection and operation of machinery which caused, or contributed to, the accident, it used due care, prudence, skill and watchfulness.

Reaffirmed and explained as to first paragraph in Stoutenburgh v. Dow, Gilman, Hancock Co., 82 Iowa 184, 47 N. W. 104; Huggard v. Glucose Sugar Refining Co., 132 Iowa 733, 109 N. W. 479, holding that when an employe, in order to perform his duty, is required to use defective machinery, and makes complaint thereof to his employer,

who promises to repair the defect, the servant can recover for an injury caused thereby within such period of time after the promise as would not preclude all reasonable expectation that the promise might be kept; and this promise may be express or implied.

Reaffirmed as to second paragraph in Youll v. Sioux City & Pac. Ry. Co., 66 Iowa 351, 23 N. W. 739; *Contri, Adm'r v. Hollingsworth Coal Co.*, 143 Iowa 121, 121 N. W. 508; *Ferguson v. Cent. Iowa Ry. Co.*, 58 Iowa 297, 12 N. W. 295.

Distinguished and qualified in Moran v. Harris, 63 Iowa 394, 395, 19 N. W. 279, holding that although an employe by remaining in the service of the employer without objection, assumes the risk of such dangers as are occasioned by defects in the machinery about which he is employed, of which he has knowledge, or of which, in the exercise of reasonable care and diligence he might have knowledge, yet he only assumes the risk of such dangers as might be occasioned by the defect in the machinery, while being used in a reasonably prudent and careful manner, and does not assume risks of such dangers as would be created by the careless or negligent manner in which the defendant might use the defective machinery.

Distinguished in Hosic v. Ch. R. I. & P. Ry. Co., 75 Iowa 686-688, 9 Am. St. Rep. 518, 37 N. W. 964, a case wherein a brakeman was held not to have assumed the risk of a dangerous defect in a car although chargeable with notice thereof.

Distinguished as to second paragraph in Bucklew v. Cent. Iowa Ry. Co., 64 Iowa 612, 21 N. W. 108, holding that where in an action for damages for personal injuries it is claimed that they were caused by the plaintiff's performing a duty according to a dangerous custom, the burden is on the defendant to prove such hypothesis.

Distinguished as to second paragraph in Pierson v. Ch. & N. W. Ry. Co., 127 Iowa 23, 102 N. W. 149, holding that proof of the usual and customary method of performing a service may be received, as bearing on the question of the employe's exercise of reasonable care in following the method indicated by custom and usage.

Cross reference. See further on this question, annotations under *Greenleaf, Adm'r, v. Ill. Cent. R. R. Co.* (29 Iowa 14), ante. p. 489.

WILCOX v. IOWA WESLEYAN UNIVERSITY, 32 IOWA 367

1. Contracts—False Representations—Action for Damages—Relief in Equity—Difference in Proof Required.—In order to entitle a person to damages in an action at law by reason of false and fraudulent representations which induced him to enter into a contract, or purchase property, he must prove that the defendant (the other party to the contract) made false and fraudulent representations as to a material fact which induced him (plaintiff) to enter into the contract, or make the purchase, and that the representations were known to be false by defendant at the time that they were made.

But the rule is otherwise in an action in equity for a rescission; and even if by mistake, and innocently, a party misrepresents a material fact, upon which another party is induced to act, it is as conclusive a ground of relief in equity as a willful and false assertion, pp. 373, 375.

Reaffirmed and explained in Hubbard v. Weare, 79 Iowa 686, 44 N. W. 917, holding that, though equity will relieve against false representations innocently made, the law will not afford relief on the grounds of false and fraudulent representations, unless it be shown that the party making the representations knew them to be false, or that he made them under circumstances from which such knowledge will be inferred.

Reaffirmed and qualified in Seeberger v. Hobert, 55 Iowa 757 (abstract) 8 N. W. 483, holding that statements by defendant constituting matters of opinion as distinguished from representations as to quality, do not entitle plaintiff to relief either at law or in equity.

Reaffirmed and explained as to second paragraph in Findley v. Richardson, 46 Iowa 105, holding that the representations must be as to matters on which the party has a right to rely, and it must appear that they were relied on; that they may be as to the character, situation, extent, or possibly to the value, when the land is at a distance and no opportunity is given to examine the same.

Reaffirmed as to second paragraph in Swezey v. Collins, 36 Iowa 591, 592; Hasleton v. Dickinson, 51 Iowa 247-249, 1 N. W. 553; Curry v. Supervisors of Decatur County, 61 Iowa 74, 15 N. W. 604; Mohler v. Carder, 73 Iowa 583, 584, 35 N. W. 648; Moyle v. Silbaugh, 105 Iowa 533, 75 N. W. 362; Weise v. Grove, 123 Iowa 589, 99 N. W. 192; New York Brokerage Co. v. Wharton, 143 Iowa 64, 65, 119 N. W. 971.

Cited in Hood v. Smith, 79 Iowa 626, 44 N. W. 904, not in point but upon analogy.

Cross reference. See further in this connection, annotations under Hallam v. Todhunter (24 Iowa 166), ante. p. 160.

2. Deeds—Insufficient Delivery—Delivery after Death of Grantor—Insufficient Tender of.—A deed delivered to the grantee after the death of the grantor conveys no title.

And so a tender to the grantee of a deed after the death of the grantor is of no effect, p. 375.

Reaffirmed and varied in Butterfield v. Walsh, 36 Iowa 538, holding that a tax deed executed by the county treasurer to the holder of the tax certificate after the death of the latter, conveys no title and is of no effect whatever.

COMSTOCK v. DES MOINES VALLEY R. R. Co., 32 Iowa 376

1. Railroads—Liability for Killing or Injuring Stock—Depot and Station Grounds—Burden of Proof.—In an action against a

railroad company for killing or injuring stock—brought under Chap. 169 Acts of 1862—the burden is on the plaintiff to show that the killing or injuring occurred at a place where the defendant had a right to but had not fenced.

A railroad company has no right to fence depot and station grounds; but in such an action the burden is on the defendant to prove the boundaries thereof, and that certain switches were included therein, pp. 378, 379.

Reaffirmed as to second paragraph in Cole v. C. & N. W. R. R. Co., 38 Iowa 314; Smith v. C. M. & St. P. R. R. Co., 60 Iowa 514, 15 N. W. 304.

Reaffirmed and narrowed in Kyser v. K. C. St. J. & C. B. R. R. Co., 56 Iowa 208, 9 N. W. 133, holding that in an action to recover for stock killed by a train upon a railroad, the burden rests upon the plaintiff to show that the injury was done at a point where the company is required to fence its track.

Cited as to first paragraph in Taylor v. Ch. St. P. & K. C. Ry. Co., 76 Iowa 755, 40 N. W. 86, the case turning on other points.

Cross reference. See further on this question, annotations under Davis v. B. & M. Riv. R. R. Co. (26 Iowa 549), ante. p. 361.

PORTER v. KILGORE, 32 IOWA 379

1. Mortgage on Land—Action to Foreclose—Parties—Purchase of Land, Rights of—Redemption.—Where an action is brought to foreclose a mortgage on land after the mortgagor has sold and conveyed it to a third person and such conveyance has been recorded, the latter or purchaser will not be cut off from his right to redeem from the mortgage by a decree in such action, if he is not made a party thereto, pp. 381, 382.

Reaffirmed and extended in Barrett v. Blackmar, 47 Iowa 571, holding that in equity the right of a purchaser from a mortgagor and who is not made a party to the foreclosure, is to redeem from the mortgage: And that the party bringing his action to redeem is entitled to rents and profits, and under some circumstances, he is chargeable with valuable and lasting improvements.

Reaffirmed and varied in Harsh, Gd'n, v. Griffin, 72 Iowa 609, 610, 34 N. W. 442, holding that heirs of a decedent mortgagor who are not made parties to an action of a mortgagee to foreclose his mortgage on land, are not cut off from their right to redeem from a decree of foreclosure and sale thereunder therein.

Cited in Nelson v. Larsen, 78 Iowa 28, 42 N. W. 575, the case turning on another question.

Cross references. See further on this question, annotations under Douglass v. Bishop (27 Iowa 214), ante. p. 391; Anson v. Anson (20 Iowa 55), Vol. II, p. 774.

MUSSELMAN v. GALLIGHER, 32 IOWA 383

1. Husband and Wife—Torts—Malicious Prosecution—Action for by Wife—Husband Not a Necessary Party.—Under the Code of 1860 and Chap. 167, Acts of 1870 (13th General Assembly) a married woman may sue alone for malicious prosecution or other tort committed upon or injuring her; and her husband has no interest in her damages resulting therefrom such as will make him either a necessary or proper party thereto, pp. 384-386.

Reaffirmed in Pancoast v. Burnell, 32 Iowa 397; Tuttle v. C. R. I. & P. R. R. Co., 42 Iowa 520.

Distinguished in Peters v. Peters, 42 Iowa 184, 185, holding that a wife cannot sue her husband for a tort committed by him during coverture.

Distinguished in Mewhirter v. Hatten, 42 Iowa 290, 291, 20 Am. Rep. 618, holding that a husband may sue for special damages resulting to him by reason of injuries received by his wife by reason of negligence, malpractice or any tort.

PANCOAST v. BURNELL, 32 IOWA 394

1. Husband and Wife—Torts—Libel and Slander—Action by Wife for—Husband Not Necessary Party.—Under the Code of 1860 and Chap. 167, Acts of 1870 (13 General Assembly), a married woman may sue for libel or other tort without joining her husband as a party, pp. 396, 397.

Special cross reference. For cases citing, reaffirming, and distinguishing the text, and others, see annotations under Musselman v. Galligher (32 Iowa 383), next preceding.

SULLY v. GOLDSMITH, 32 IOWA 397

1. Negotiable Promissory Note—Fraud as Defense to—Rights of Bona Fide Holder for Value, etc.—That a negotiable note was obtained by fraud is no defense against a holder for value who took before its maturity and without notice thereof; and this is the rule although the holder paid less than face value therefor, p. 399.

Reaffirmed and explained in Lay v. Wissman, 36 Iowa 307-309, holding that in an action on a negotiable note or other such instrument, equities existing between the maker and the payee cannot be set up against an indorsee in the ordinary course of business, for a valuable consideration, in good faith, and before maturity, and that such an indorsee may recover the face value of the note although he may have paid less therefor.

Cross reference. See further on this question, annotations under Lake v. Reed (29 Iowa 258), ante. p. 523; Gage v. Sharp (24 Iowa 15), ante. p. 140.

CLARK v. RICHARDSON, 32 IOWA 399

1. **Dower—Rights of Widow in Dower Assigned—Subsequent Partition or Sale by Heirs not Allowed.**—After dower has been ad-measured and assigned to a widow she is entitled to the possession of the land; and the heirs of her husband cannot compel her to sell her interest or accept money or other land in lieu thereof, pp. 401, 402.

Reaffirmed and extended in Henderson v. Henderson, 136 Iowa, 568, 114 N. W. 179, holding further that when the heirs of a decedent agree with the widow for her to hold certain land as dower during her life, they cannot, after she has acted thereon, rescind the agreement or sue for a partition or sale thereof.

Reaffirmed and varied in Smith v. Runnels, 97 Iowa 57, 65 N. W. 1003, holding that one who holds a life estate in land under a devise cannot sue the remaindermen for a partition or sale thereof.

Cited in Johnson v. Moser, 72 Iowa 525, 34 N. W. 315, not in point, but upon analogy.

STATE v. MERCER, 32 IOWA 405

1. **Intoxicating Liquors—Nuisance—Social Club—Employee of Guilty of Unlawful Selling.**—Where an employe of a social club sells tickets to members to be exchanged for intoxicating liquors, and keeps the liquors and serves them to the members, he is guilty of the offense of a nuisance, under Secs. 1559, 1563, 1564 of the Code of 1860, and may be convicted thereof under such facts, pp. 406, 407.

Reaffirmed in State v. Johns, 140 Iowa 133, 134, 118 N. W. 299, holding that the keeping for distribution among or the distributing to club members is a violation of law.

Cited with approval in Town of Cantril v. Sainer, 59 Iowa 27, 12 N. W. 752, a case wherein a town ordinance on this subject was held invalid on another ground.

Cross references. See further in this connection, South Shore Country Club v. People, 119 Am. St. Rep. 417, 12 L. R. A. (New Series) 519; Mohrman v. State, 70 Am. St. Rep. 74, 43 L. R. A. 398; People v. L. & O. Club, 62 L. R. A. 884; State v. Easton Club, 10 L. R. A. 64.

HOLLOWAY v. GRIFFITH, 32 IOWA 409, 7 AM. REP. 208

1. **Breach of Promise to Marry—Declaration or Renunciation by Man before Time Fixed—Effect.**—When a man declares that he will not perform his promise to marry a female or renounces the agreement therefor before the time fixed for the marriage, she may treat the agreement as at an end and immediately sue for damages, pp. 412-414.

Reaffirmed and extended in Richmond and Jackson v. D. & S. C. R. R. Co., et al, 40 Iowa 276; McCormick v. Basal, 46 Iowa 236;

Quarton v. Am. Law Book Co., 143 Iowa 529, 121 N. W. 1013, holding—as does the present case in argument—that in all cases if, before the time for performing a contract arrives, the promisor renounces or repudiates the contract or puts it out of his power to perform, the other party may at once maintain an action as for a breach thereof, to recover the damages sustained.

Reaffirmed and varied in Kuhlman v. Wieben, 129 Iowa 189, 190, 2 L. R. A. (New Series) 666, 105 N. W. 446, holding that where one party to a contract expressly renounces it, or puts it out of his power to perform it, the other party thereto may sue thereon without tender or demand.

Reaffirmed and qualified in Rime v. Rater, 108 Iowa 64, 78 N. W. 836, holding that when a promise or agreement to marry is general and there is no exact date fixed for the ceremony, the statute of limitation does not commence to run against an action for breach thereof, until a breach thereof, either by one of the parties having put it out of his or her power to perform, by marrying another, or by notice of a purpose not to perform, or by an absolute refusal to perform: That as a general rule, if the date for the marriage is not definitely fixed, there is no breach until request be made, or until one or the other of the parties has put it out of their power to perform.

Cross reference. See further in this connection, annotations under Rule 3 of Crabtree v. Messersmith (19 Iowa 179), Vol. II, p. 713.

2. Breach of Promise to Marry—Action for—Evidence—Pecuniary Circumstances and Social Standing of Defendant—Injury to Feelings, Pride and Affections—Damages.—In an action for damages for breach of promise to marry, the jury may, in estimating damages, consider the injury done to plaintiff's pride, feelings and affections as well as her damages from the loss of the marriage.

As the loss of marriage is an element of damage, it is proper for the jury to consider the pecuniary, as well as the social, standing of the defendant as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage; but the question, whether the defendant will be able to pay the damages awarded, should have no influence with the jury in estimating the damages, pp. 415, 416.

Reaffirmed in Royal v. Smith, 40 Iowa 618, 619; Vierling v. Binder, 113 Iowa 342, 343, 85 N. W. 623; Herriman v. Layman, 118 Iowa 592, 92 N. W. 711; Lauer v. Banning, 152 Iowa 106.

Reaffirmed and varied as to first paragraph in Mentzer v. Western Union Telegraph Co., 93 Iowa 762, 763, 768, 57 Am. St. Rep. 294, 28 L. R. A. 72, 62 N. W. 4, holding that in an action against a telegraph company for negligence in failing to deliver a telegram whereby a child is prevented from attending his mother's funeral, the plaintiff may recover damages for mental suffering.

Unreported citation 131 N. W. 786.

CARMICHAEL v. BODFISH, 32 IOWA 418

1. Contracts—Usury—Who Cannot Interpose Plea.—A stranger to a contract which is usurious cannot interpose the plea of usury, pp. 419, 420.

Reaffirmed in Miller v. Clark, 37 Iowa 328; Nat'l L. Ins. Co. v. Olmsted, 52 Iowa 358, 3 N. W. 117; Pardoe v. Iowa State Nat'l Bank, 106 Iowa 351, 76 N. W. 802.

Reaffirmed and extended in Kendig v. Lin and Hauson, 47 Iowa 64, holding that a surety on a usurious contract may interpose the plea.

Cross reference. See further on this question, annotations under Perry v. Kearns (13 Iowa 174), Vol. II, p. 134.

MITCHELL v. HOME INSURANCE CO., 32 IOWA 421

1. Appeal—Exclusion of Evidence as Ground for Reversal—Harmless Error—Affirmance.—Where evidence is excluded by the court and later during the trial is admitted without objection, the first ruling excluding will not be ground for reversal, although it was error. Nor will the erroneous exclusion of evidence be ground for reversal, when the record upon appeal shows that from all the evidence the exclusion worked no prejudice to the party complaining, pp. 424, 425.

Reaffirmed in Krell v. Chickasaw Farmer's Mut. F. Ins. Co., 127 Iowa 751, 104 N. W. 365.

Cited in Stennett v. Penn. Fire Ins. Co., 68 Iowa 675, 28 N. W. 12, the case turning on other points.

2. Written Instruments—United States Revenue Stamp—Failure to Affix—When Instrument Invalid or Inadmissible in Evidence.—The failure to affix a United States Revenue stamp to a written instrument as required by the Act of Congress of 1864, does not render it invalid or inadmissible in evidence, unless the stamp was omitted with intent to evade the law and therefore to defraud the Government. The case of Hugus v. Strickler, 19 Iowa 413, is overruled, p. 425.

Reaffirmed in Ricord v. Jones, 33 Iowa 27; Ogden v. Farney, 33 Iowa 206; Brown v. Scott, 34 Iowa 576 (abstract); Morgan v. Graham, 35 Iowa 217; Works v. Hershey, 35 Iowa 344; Collins v. Val-leau, 79 Iowa 629, 43 N. W. 285; Hall v. Cardell, 111 Iowa 209, 210, 82 N. W. 504.

Cited in State v. Shields, 112 Iowa 29, 83 N. W. 808; Harvey v. Wieland, 115 Iowa 565, 88 N. W. 1078; State v. Glucose Sugar Refining Co., 117 Iowa 530, 91 N. W. 796; F. & T. Bk. v. Johnson, 118 Iowa 287, 91 N. W. 1076; Bottorff v. Lewis, 121 Iowa 36, 95 N. W. 265; Dorr Cattle Co. v. Des Moines Nat'l Bk., 127 Iowa 156, 4 Am. & Eng. Ann. Cas., 519, 98 N. W. 920, under the United States Revenue Act of 1898.

DUNLIETH & DUBUQUE BRIDGE CO. v. CITY OF DUBUQUE, 32 IOWA 427

1. Taxation and Revenue—Railroads—Municipal Corporations—Taxation by.—Chap. 196, Acts of 1868 (12th General Assembly) providing that railroads shall be taxed one per cent. of their gross earnings in lieu of all taxes, is construed to mean in lieu of state and county taxes; and such Act does not exempt such railroads from the payment of city taxes.

A city authorized by its charter to levy and collect taxes on all taxable property within its limits, may levy and collect taxes on the depot, tracks, real estate, etc., of a railroad company in such limits, pp. 428-431.

Reaffirmed in City of Davenport v. C. R. I. & P. R. R. Co., 38 Iowa 639, 644, holding also, that under Art. 8 of the Constitution, Chap. 26, Laws of 1872 (14th General Assembly) releasing railroad companies that have paid taxes on their gross earning as provided by Chap. 106 Laws of 1870 (13th General Assembly), from certain municipal taxation, is unconstitutional.

Reaffirmed and extended in City of Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 59, 60, 67, 68, 77, 81, 82 (cited in concurring and dissenting opinions, 81, 83, 92), holding that the rolling stock of a railroad company is subject to municipal taxation in the city wherein it has its chief place of business in this state: And holding, also, that Chap. 26, Acts of 1872 (14th General Assembly), to the extent that it releases railroad companies from liability for city taxes accruing under Chap. 105, Acts of 1870 (13th General Assembly), is unconstitutional—and to the same effect is Iowa R. R. Land Co. and S. C. P. R. R. Co. v. Woodbury County, 39 Iowa 177, 178, reaffirming the text.

Reaffirmed in Hawkeye Ins. Co. v. French, 109 Iowa 591, 80 N. W. 662, the court holding that Sec. 1333 of the Code of 1897, in so far as it relieves insurance companies from payment of taxes on personal property, and from taxation for road, school, city, and county purposes, is unconstitutional—and see to the same effect Layman, county treasurer v. Iowa Telephone Co., 123 Iowa 595, 99 N. W. 206, reaffirming the text, and holding Secs. 1328 et seq. exempting telegraph and telephone companies from local taxation to be unconstitutional.

Cited in Sioux City v. Indep. Sch. Dist, of Sioux City, 55 Iowa 153, 7 N. W. 490; Farwell v. Des Moines Brick Mfg. Co., 97 Iowa 247, 35 L. R. A. 63, 66 N. W. 180, the cases turning on another point.

Distinguished in City of Dubuque v. C. D. & M. R. R. Co., 47 Iowa 197-199, 202, 203, holding that Chap. 26, Acts of 1872 (14th General Assembly) abrogates the rule.

HOWE MACHINE CO. v. SNOW, 32 IOWA 433

1. Estoppel in Pais—Person Contracting with Corporation.—Under Sec. 1181 of the Code of 1860, a person who contracts with a

corporation is estopped from denying its corporate capacity or its authority to contract, p. 434.

Reaffirmed and extended in Courtright v. Deeds, 37 Iowa 511, 512, holding further under Sec. 1087 of the Code of 1873 corresponding to the Section of the text that if a person or corporation execute his note under an arrangement that it shall be transferred to any other person or corporation who shall do certain labor, the performance of which constitutes the consideration of the instrument, he cannot question the capacity of the person or corporation receiving the note and doing the labor under such a contract, to enforce it against him, if such person or corporation could have enforced the contract had it been made with him or it originally.

Cited with approval in Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 245, 91 N. W. 1085, the case turning on another question.

Cross reference. See further on this question, annotations under Washington College v. Duke (14 Iowa 14), Vol. II, p. 198.

2. Evidence—Principal and Agent—Declarations and Admissions, etc., of Agent, Admissibility.—Declarations, representations and admissions of an agent made while he is negotiating a transaction or contract are admissible in evidence against the principal in an action involving the contract or transaction, pp. 435, 436.

Reaffirmed and explained in Vohs v. Shorthill Co., 124 Iowa 476, 100 N. W. 498, holding that the declarations of an agent are binding upon his principal only when made while the agent is engaged in the business in reference to which the statement is made, and while acting within the scope of his authority.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

MCGILL v. GRIFFIN, 32 IOWA 445

1. Mortgage—Stipulation as to Payment of Attorney's Fee In Case of Foreclosure, Not Usurious.—A stipulation in a mortgage for the payment of an attorney's fee in the event that default should be made in the payment of the notes and a suit to foreclose should be instituted, is not an usurious contract, pp. 446, 447.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Rule 2 of Williams v. Meeker (29 Iowa 292), ante. p. 530.

SNYDER v. TIBBALS, 32 IOWA 447

1. Sales of Personal Property—When Title Passes to Buyer.—A sale of personal property is not complete and the title does not pass to the buyer while anything remains to be done between the buyer and seller in relation to the thing sold, or, if the quantity is to be determined in order to fix the price, unless it is to be done by the buyer alone, pp. 449, 450.

Reaffirmed and explained in Augustine v. McDowell, 120 Iowa 403-405, 94 N. W. 919, holding further that where a sale of grain is uncompleted as in the text, a subsequent buyer of a certain quantity thereof who has his portion set apart or delivered, has the superior title thereto.

Reaffirmed and explained in Martin Bros. & Co. v. Lesan, 129 Iowa 579, 580, 105 N. W. 998, holding that where a person agrees to buy a certain number of cattle in a drove of many more, with no other description than that they are the cattle covered by a certain mortgage and there is no separation of the cattle from the drove, that such transaction does not constitute a sale.

Reaffirmed and extended in Harwick v. Weddington, 73 Iowa 302, 303, 34 N. W. 870, holding further that where a certain quantity of grain is sold, which is contained in a bulk along with more, such sale is void as against an attachment or execution creditor of the seller, who levies before it is separated from the bulk.

Reaffirmed and qualified in Hesser & Hale v. Wilson, 36 Iowa 155, holding that a sale of personal property unaccompanied with delivery is inferior to the rights of a subsequent mortgagee thereof from the seller, without notice of the prior sale.

Reaffirmed and qualified in Welch v. Spies, 103 Iowa 391, 392, 72 N. W. 549; Augustine v. McDowell, 120 Iowa 403, 94 N. W. 919; Allen v. Elmore, 121 Iowa 242, 243, 96 N. W. 769; Semple v. N. H. Lumber Co., 142 Iowa 591, 121 N. W. 25, holding that the title to personal property which is specifically designated and identified and distinguished from other property may, as between the parties, pass by a sale, although it may require something to be done in relation thereto, such as weighing, measuring, separating, etc., and that in such cases it is a question of the intention of the parties as shown by the contract.

Distinguished in First Nat'l Bk. of Ottumwa v. Reno, 73 Iowa 148, 34 N. W. 797, holding that where parties to a contract of sale of personal property agree that title thereto shall pass to the buyer without delivery, the title passes immediately to him as against the seller, and his attachment, or execution creditor who seizes the property with notice of the sale.

Cross references. See further on this question, annotations under McClung v. Kelly (21 Iowa 508), Vol. II, p. 929; Courtright & Co. v. Leonard (11 Iowa 32), Vol. I, p. 766.

WILE v. WRIGHT, ADM'X, 32 IOWA 451

1. Decedent's Estate—Claim against May be Sworn to After It Is Filed.—A claim against a decedent's estate may be sworn to after it is properly filed; and the omission of the oath required by Sec. 2391 of the Code of 1860, does not render the filing thereof void, p. 457.

Reaffirmed in McCrary v. Deming, 38 Iowa 531; Moore v. McKinley et al, Ex'rs, 60 Iowa 370, 14 N. W. 770; Wise v. Outtrim,

Ex'x, 139 Iowa 199, 117 N. W. 267, under the Codes of 1873, and 1897, provisions corresponding to the section of the text.

Cited in Rush v. Rush, 46 Iowa 651, 26 Am. Rep. 179, upon analogy.

2. Decedent's Estate—When Fourth Class Claims against to be Filed, Proved and Allowed—Exception to the Rule—When Claim Barred.—A claim against a decedent's estate of the fourth class must—under Sec. 2405 of the Code of 1860—be filed, proved and allowed within a year and a half after the giving of notice by the administrator of his appointment, or it is barred: Unless there are peculiar circumstances entitling the claimant, creditor, to equitable relief from such bar, pp. 457-459.

Reaffirmed in Wilcox v. Jackson, 51 Iowa 298, 1 N. W. 539; Brownell v. Williams, 54 Iowa 355, 6 N. W. 531, under Sec. 2421 of the Code of 1873, requiring the creditor of decedent to file and prove his claim, and have it allowed within twelve months after the giving of notice of his appointment by the administrator, except for the peculiar circumstances set out in the text.

Cross reference. See further on this question, annotations and cross references under Noble v. Morrey, Adm'r (19 Iowa 509), Vol. II, p. 755.

3. Appeal—Harmless Error.—Errors in the proceedings or rulings of the trial court which could have worked no prejudice to the party appealing will not be ground for reversal, p. 459.

Reaffirmed in Smith v. Eaton, 50 Iowa 491.

(Note.—There are numerous cases sustaining but not citing the text.—Ed.)

4. Decedent's Estate — Personal Representative — Personal Judgment Against—Reversal, When.—Where in an action against a personal representative, judgment is erroneously entered against him as individual, instead of as representative, he cannot complain thereof upon appeal, unless he called the trial court's attention thereto, and moved for its correction before prosecuting the appeal, p. 461.

Reaffirmed and qualified in Tyler v. Langworthy, 37 Iowa 559, 560, holding that where in an action against a personal representative, a judgment against him is not plain as to whether it is *personal* or *as representative*, the court will give it a construction favorable to the latter and so as to relieve it of error, if such is possible from an examination of the entire record in the case.

Unreported citation 134 N. W. 738.

BULKLEY v. CALLANAN, 32 IOWA 461

1. Tax Sale of Land—Sale of Several Parcels in Gross—When Allowed and When Not.—Where land is properly and legally assessed for taxation *in a body* instead of in parcels, it may be sold for taxes

in gross; but if separate parcels of land are assessed separately, or are in fact distinct and separate, a sale thereof in gross is void, p. 463.

Reaffirmed in Sibley v. Bullis, 40 Iowa 431.

Special cross reference. For further cases citing and sustaining the text and others on the question, see annotations under Rule 1 of Corbin v. De Wolf (25 Iowa 124), ante. p. 244.

2. Tax Sale of Land—Conclusiveness of Recitals in Tax Deed.

—Under Sec. 784 of the Code of 1860, the recitals in a tax deed to land is conclusive as to the *manner* of sale, pp. 464, 465.

Reaffirmed in Clark v. Thompson, 37 Iowa 539; Easton v. Perry, 37 Iowa 683; Sibley v. Bullis, 40 Iowa 430, 431.

Reaffirmed in Farmers' Loan & Trust Co. v. Wall, 129 Iowa 654, 106 N. W. 161, under Sec. 1444 of the Code of 1897, corresponding to the section of the text.

Reaffirmed and qualified in Smith v. Easton, 37 Iowa 585, 586, holding that a tax deed is conclusive as to the legality of proceedings as to the manner of sale, unless it shows on its face that the law has been violated.

Cross reference. See further on this question, annotations under McCready v. Sexton & Sons (29 Iowa 356), ante. p. 539.

3. Tax Deed to Land Failing to Convey Title or Recite Facts Correctly—Power of County Treasurer to Execute Second Deed.—

Where a tax deed to land fails to convey the legal title to the tax sale purchaser, or fails to correctly recite the facts, the county treasurer may execute a second deed to such purchaser conveying the legal title, or correcting the mistake in the recitals of the first deed. But this rule only applies where there has been a valid tax sale. And where the county treasurer executes a sufficient and valid deed to land to a tax purchaser, a second and subsequent deed thereto made by that officer is a nullity, p. 466.

Reaffirmed in Martin v. Cole, 38 Iowa 148; Gould v. Thompson, 45 Iowa 451.

Cross reference. See further on this question, annotations under Rule 4 of McCready v. Sexton & Sons (29 Iowa 356), ante. p. 539.

O'KEEFE, ADM'X, v. CHICAGO, ROCK ISLAND & PAC. R. R. Co., 32
IOWA 467

1. Negligence — Contributory Negligence — Intoxication of Plaintiff as Evidence of.—In an action to recover damages for the negligent act of the defendant, the plaintiff will not be entitled to recover if his own negligence contributed directly to the injury.

This rule applies to an action by an administrator to recover for the death of his decedent caused by the negligence of defendant.

The intoxication of plaintiff or of plaintiff's decedent, if the action is by an administrator, at the time of the injury is competent to be

proven as bearing upon the question of contributory negligence or his failure to exercise ordinary care, pp. 468, 469.

Reaffirmed as to first and second paragraph in Johnson v. Tillson 36 Iowa 91; Artz v. C. R. I. & P. R. R. Co., 38 Iowa 296, 297; Dale v. Webster County, 76 Iowa 373, 374, 41 N. W. 2; Jerolman v. Ch. G. W. Ry. Co., 108 Iowa 179, 180, 78 N. W. 856.

Reaffirmed and explained as to last paragraph in Hughes v. Ch. R. I. & P. Ry. Co., 150 Iowa 236, 124 N. W. 893, holding that in an action for personal injuries claimed to have been caused by the negligence of the defendant, the fact that the plaintiff was intoxicated at the time of the accident is admissible as evidence as bearing on the question of contributory negligence, but does not bar a recovery unless by reason of such intoxication the party injured fails to exercise the ordinary care of a sober man or is unable by reason thereof to take the usual and ordinary precautions to avoid danger.

Reaffirmed and extended in Carlin v. Ch. R. I. & P. R. R. Co., 37 Iowa 321, 322; Benton v. Cent. R. R. of Iowa, 42 Iowa 195; Lang v. Holiday Creek R. R. Co., 42 Iowa 681, holding further that the burden is on the plaintiff to prove not only the negligence of the defendant, but his own or his decedent's exercise of ordinary care, or the absence of contributory negligence.

Cited in Gwynn v. Duffield, 66 Iowa 713, 55 Am. Rep. 286, 24 N. W. 525, the court holding that a person trespassing upon the property of another cannot recover for an injury sustained through the negligence of the owner in respect to such property, unless the negligence was wanton, or evinced an indifference to the safety of others.

Distinguished in McCormick v. Ottumwa Ry. & Light Co., 146 Iowa 130, 121 N. W. 384; Orr v. Cedar Rapids & Marion City Ry. Co., 94 Iowa 431, 432, 62 N. W. 853, the cases involving the doctrine of "the last clear chance," that is that where both parties are negligent, the one that has the last clear opportunity to avoid the accident, notwithstanding negligence of the other, is solely responsible for it—and see Bourrett v. Ch. & N. W. Ry. Co., 152 Iowa 582-584 (dissenting opinion citing the rule, 587), the majority court holding that this doctrine of "the last clear chance" does not apply until the concurring negligence of the parties has ceased.

Unreported citation 129 N. W. 957; 132 N. W. 976.

Cross reference. See further on this question, annotations under Rule 4 of Greenleaf, Adm'r, v. Ill. Cent. R. R. Co., (29 Iowa 14), ante. p. 89.

BANTA v. WOOD, 32 IOWA 469

1. Actions—Attachment—Service of Notice by Publication—Kind of Judgment Allowed.—Where service of notice is had by publication in an attachment action the judgment thereon must be *in rem* and bind only the attached property, and cannot be *in personam*, or bind any other property of the defendant, p. 473.

Reaffirmed in Mayfield v. Bennett, 48 Iowa 198.

2. Mortgage—Action at Law on Note Secured by.—A mortgagee may waive his right to foreclose and sue at law on the note secured, or he may foreclose the mortgage, exhaust the mortgaged property, and then sue at law on the secured note for the residue of his debt, p. 474.

Reaffirmed in Brown v. Cascaden, 43 Iowa 105, 106; Beeson v. Green, 103 Iowa 408, 409, 72 N. W. 555.

Reaffirmed and extended in McDonald v. Second Nat'l Bk., 106 Iowa 521, 522, 76 N. W. 1012, holding further—under Sec. 4288 of the Code of 1897—that an action to foreclose a mortgage or other lien upon real estate must be brought in the county wherein it, or some part of it, is situated; but that such an action may be brought in such county and another action at the same time be brought on the note secured by the mortgage in the county of the defendant's (mortgagor's) residence; or judgment may be obtained in the latter action, and thereafter an action to foreclose the mortgage be instituted in the county wherein the real estate, or some part of it, is situated: The court holding further, however, that where an action *in rem* as well as *in personam* is brought in the wrong county (such as actions to foreclose a mortgage), the defendant waives the error unless before answer, he demands a change of venue to the proper county; but the rule is otherwise where the action is *in rem* only.

Cited in Newbury v. Rutter, 38 Iowa 182, the case turning on another point.

WASHBURN v. CARMICHAEL, 32 IOWA 475

1. Guardian and Ward—Guardian's Sale of Land—Action by Ward to Set Aside—When Tender Required of Purchase Price to Purchaser.—In an action in equity by a ward to set aside a guardian's sale of land, the petition need not aver that the plaintiff (ward) tendered the purchase price to the purchaser thereat, unless the latter never took possession and used the premises, pp. 477, 478.

Reaffirmed in Lyon v. Vanatta, 32 Iowa 530.

2. Guardian and Ward—Guardian's Sale of Land—Want of Notice to Ward—Order of Court and Sale under, Void.—When no notice is given to the ward of an application for an order of court for a sale of his land by his guardian, the order and sale made thereunder are void, pp. 478, 479.

Reaffirmed and explained in Lyon v. Vanatta, 35 Iowa 524-527, holding that when there is such a defective original notice as to be equivalent to *no notice*, the judgment and all proceedings are void, whether assailed directly or collaterally: Holding, also, that such a notice is one which warns defendant to appear and answer at a time when the term of court is not in session and before it commences.

Reaffirmed and extended in Rankin v. Miller, 43 Iowa 21, 22, holding further that probate proceedings to sell real estate of a decedent, where the heirs and persons having an interest therein are not served with notice, are void *ab initio* as well as a sale made thereunder.

Reaffirmed and varied in Mullin v. White & Hudson, 134 Iowa 684, 112 N. W. 165, holding that a judgment in a probate proceeding for the sale of real estate of a decedent, is void as to the interest of an heir, or other person having an interest or lien thereon, who is not served with notice thereof.

Cited with approval in Gregg v. Myatt, 78 Iowa 706, 42 N. W. 461 (opinion on rehearing), the first opinion holding that—under Sec. 2353 of the Code of 1873—when a party is personally served with notice of a proceeding to probate a will, and fails to appear and make contest therein, or when he appears therein and contests or waives contest of the will, he is thereby estopped from instituting an original action in the district court to set it aside.

Cross references. See further on this question, annotations under Goode v. Norley (28 Iowa 163), ante. p. 158.

3. Guardian and Ward—Guardian's Sale of Land—Void Sale—Action by Ward to Set Aside—Limitation of Actions—Sec. 2560 of the Code of 1860, forbidding an action to be brought to question a guardian's sale of real estate unless commenced within five years thereafter, does not apply to an action by a ward to set aside a guardian's sale of land, which was void because the order for such sale was made without notice to the plaintiff (ward); and such an action may be maintained at any time before the purchaser at the guardian's sale has had continuous possession thereof for five years, pp. 479, 480.

Reaffirmed in Rankin v. Miller, 43 Iowa 21, 22, under Sec. 2265 of the Code of 1873, corresponding to the section of the text.

Cross reference. See further on this question, annotations under Rules 2 and 3, of Pursley v. Hayes (22 Iowa 11), ante. p. 1.

EARHART v. GRANT, 32 IOWA 481

1 Negotiable Promissory Note—Garnishment of Under Execution—Indorsement by Officer—Effect—Rights of Indorsee—Fraud and Other Latent Infirmities.—Where a negotiable promissory note is garnished under an execution against the payee, and before its maturity is indorsed by the officer having the execution, pursuant to an order of court and the indorsee paying face value therefor, the indorsement being so authorized by Secs. 3272 and 3322 of the Code of 1860, the indorsee takes free from all latent defenses of the maker, such as fraud, etc., of which he had no knowledge at the time he so took the instrument, pp. 483, 484.

Cited in Wood v. McKean, 64 Iowa 18, 19 N. W. 818, the court holding that one who takes a note after its maturity takes it subject to all latent defenses.

BYINGTON v. OAKS, 32 IOWA 488

1. Practice—Pleading—Demurrer and Other Objections to—Waiver of Rulings on.—Rulings on demurrer and other motions objecting to a pleading, are waived by pleading over and going to trial on the merits, p. 489.

Reaffirmed in Phillips v. Hosford, 35 Iowa 594 (abstract).

2. Evidence—Deed—Secondary Evidence of Contents—When Admissible.—Secondary evidence of the contents of a deed is—under Secs. 4001, 4002, of the Code of 1860—inadmissible to prove title, until the party offering it introduces proof that the original is lost, or that it does not belong to him, and is not within his control; and this rule applies to the introduction of the record of such deed, or a certified copy thereof. So a copy of a deed is inadmissible when the original is in existence and on file in a case in the Supreme Court, and is procurable by the party offering the copy in evidence, p. 489.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Rule 1 of Williams v. Heath (22 Iowa 519), ante. p. 64.

STATE v. ALLEN, 32 IOWA 491

(Case involving the same facts, 32 Iowa 248.)

1. Intoxicating Liquors—Unlawful Selling—Information—Necessary Averments of.—An information charging a person with the unlawful sale of intoxicating liquors as denounced by Sec. 1562 of the Code of 1860, must state to whom they were sold, if known, and if not known such fact must be therein stated, pp. 492, 493.

Cited in State v. Butcher, 79 Iowa 111, 44 N. W. 239, the court holding that the facts constituting an offense must be stated with as much precision in an information as in an indictment.

Cited in State v. Brandt, 41 Iowa 608, 610 (dissenting opinion 623), the case involving the sufficiency of an indictment for embezzlement.

Distinguished in State v. Jordan, 39 Iowa 388, holding that an indictment for nuisance for unlawfully keeping and selling intoxicating liquors need not state the name of the person or persons to whom they were so sold.

BROWN v. CREGO, TREASURER, 32 IOWA 498

(Former appeal, 29 Iowa 321.)

1. Officers—Mandamus—When Lies.—Mandamus lies to compel a public officer to perform an imperative duty, p. 501.

Reaffirmed in Bradfield v. Wart, 36 Iowa 295.

(Note.—There are many cases sustaining but not citing the text.—Ed.)

JONES v. HOPKINS, 32 IOWA 503 ..

1. **Evidence—Part of Conversation, etc., Testified to, Whole Admissible.**—Where a witness testifies to a part of a conversation, transaction or set of facts, the whole is admissible upon cross examination, p. 504.

Reaffirmed in Hess v. Wilcox, 58 Iowa 382, 10 N. W. 848.

BRYDOLF v. WOLF, CARPENTER & Co., 32 IOWA 509

1. **Partnership—Action Against—Personal Service on One Member of Firm Sufficient—Substituted Service Insufficient.**—In an action against a partnership, personal service of original notice on one member is sufficient—under Sec. 2826 of the Code of 1860—to bind the firm.

But a substituted service under Secs. 2815, 2816 of that Code, is insufficient to bind the firm in such an action, pp. 510, 511.

Cited in Ellis v. Carpenter, 89 Iowa 523, 56 N. W. 679, not in point, but upon analogy.

Cross reference. See further on this question, annotations under Gregory, Tilton & Co. v. Harmon (10 Iowa 445), Vol. I, p. 725.

HENDERSON v. OLIVER, 32 IOWA 512

1. **Tax Sale of Several Parcels of Land of Unknown Owner—Advertisement of Sale Describing Land in Gross, Valid.**—An advertisement in gross of a tax sale of several parcels of land assessed separately to an unknown owner, is valid under Chap. 24, Acts of 1861 (8th Extra session of General Assembly), p. 513.

Reaffirmed in Clark v. Thompson, 37 Iowa 538.

COWLES, ADM'X, v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co., 32 IOWA 515

1. **New Trial—Affidavits of Jurors in Support of—When and When Not Admissible for.**—Affidavits of jurors may be received in support of a motion for a new trial and to avoid their verdict, to show any matter occurring during the trial or in the jury room which does not essentially inhere in the verdict itself; as that a juror was improperly approached by a party, his attorney or agent; that witnesses or others conversed as to the facts or merits of the case in the presence of the jurors; that the verdict was determined by aggregate or average, or by lot, or by game of chance, artifice or other improper manner; but such an affidavit will not be received to show any matter which essentially inheres in the verdict itself; as that the juror did not assent to it; that he did not understand the instructions of the court, the

statements of the witnesses, or the pleadings; that he was unduly influenced by his fellow jurors, or was mistaken in his calculation, judgment, or any other matters resting alone in his breast, pp. 517, 518.

Reaffirmed in Brown v. Cole, 45 Iowa 603; Swails v. Cissua, 61 Iowa 695, 17 N. W. 41; Griffin & Adams v. Harriman, 74 Iowa 439, 440, 38 N. W. 141; State v. Beste, 91 Iowa 568, 569, 60 N. W. 113; State v. Whallen, 98 Iowa 673, 68 N. W. 557; Purcell v. Tibbles, 101 Iowa 27, 69 N. W. 1121; Baxter v. City of Cedar Rapids, 103 Iowa 608, 609, 72 N. W. 793; Clark v. Van Vleck, 135 Iowa 200, 112 N. W. 651; State v. Steidley, 135 Iowa 519, 113 N. W. 336; State v. Dudley, 147 Iowa 653, 126 N. W. 815.

Cross reference. See further on this question, annotations and cross references under Hall & Co. v. Robinson (25 Iowa 91), ante. p. 239.

CORNELL COLLEGE v. IOWA COUNTY, 32 IOWA 520

1. Counties—Action Against—Intervention by Tax Payer—When and When Not Allowed.—In an action against a county on a claim allowed to be brought by the county board of supervisors, a tax payer cannot intervene and defend—under Sec. 2930 of the Code of 1860—unless bad faith on the part of the board in consenting to the action be averred and proved, pp. 522, 523.

Reaffirmed and explained in Greeley v. Lyon County, 40 Iowa 75, holding that where in an action against a county it appears by the petition of intervention of a tax payer that the county board of supervisors are colluding with the plaintiff to procure an unjust judgment against the county, the tax payer has a right to intervene under Sec. 2683 of the Code of 1873, corresponding to the text.

Reaffirmed and explained in Semones v. Needles, 137 Iowa 182, 183, 15 Am. & Eng. Ann. Cas., 1012, 14 L. R. A. 1156, 114 N. W. 906, holding that in all cases where the board of supervisors assume the exercise of powers not conferred upon them by law, or fail to discharge their duties, so as to involve a breach of trust, a court of equity will afford relief at the instance of a tax payer.

Reaffirmed and varied in Collins v. Davis, 57 Iowa 259, 10 N. W. 644, holding that a citizen and tax payer of a city, may maintain *Certiorari* to annul the action of the city council in illegally reducing taxes or assessments of another tax payer.

Reaffirmed and varied in Hospers v. Wyatt, 63 Iowa 265, 19 N. W. 205, holding that injunction lies upon complaint of a citizen and tax payer of a county to restrain the refunding of certain taxes to another tax payer, illegally ordered refunded by the county board of supervisors.

Reaffirmed and varied in Snyder v. Foster, 77 Iowa 640, 42 N. W. 506, holding that a tax payer may maintain an action in his own name to prevent unlawful acts by public officers, which would increase

the amount of taxes he is required to pay, or diminish a fund to which he has contributed—hence holding that injunction lies upon complaint of a tax payer of a county to restrain the application of any of the county's funds to the payment of claims for the building of a bridge over a navigable lake, built or about to be built without lawful authority (in this case without a special Act of Congress or of the General Assembly of Iowa granting authority therefor, to the county board of supervisors): The court holding further that—under the Code of 1873—the county board of supervisors has no authority to erect a bridge over a navigable lake.

Reaffirmed and varied in Anderson v. Orient Fire Ins. Co., 88 Iowa 586, 55 N. W. 350, holding that injunction lies upon complaint of a tax payer to restrain the collection of a tax to pay and cancel illegal county bonds.

Cited with approval in Tredway v. Sioux City & Pac. R. R. Co., 39 Iowa 665, turning on another point.

WALKER v. KYNETT, 32 IOWA 524

1. Actions—Equitable Defenses in Law Action—Trial—Practice—Circuit Court.—The defendant may—under the Code of 1860—plead equitable defenses in an action at law; and he has the right to have them tried as equitable issues. And in such case it is entirely proper for the court to order, and indeed good practice demands under ordinary circumstances, that such issues be first tried and settled. This rule applies to actions at law in the circuit court, pp. 527, 528.

Special cross reference. For cases citing and sustaining, the text, and others, see annotations under Hackett v. High (28 Iowa 539), ante. p. 480.

2. Actions—Want of Jurisdiction of Subject-Matter—Consent or Act of Parties Does Not Waive—When Question Can be Raised.—When the law does not confer jurisdiction of the subject-matter of an action, neither consent nor any act of the parties will authorize a court to adjudicate thereon.

An objection that the court has no jurisdiction of a cause of action may be made at any stage of the proceedings and even for the first time upon appeal, p. 529.

Reaffirmed in Cerro Gordo County v. Rice County, 59 Iowa 486, 13 N. W. 645.

Reaffirmed and explained in Slack v. Blackburn, 64 Iowa 375, 20 N. W. 478, holding that all proceedings in an action or proceeding are void, where it affirmatively appears that the court lacked jurisdiction, whether the court be of general or limited jurisdiction; and that where a certain act or acts is or are necessary to confer jurisdiction, the record must affirmatively show such to have been done.

Special cross reference. For further cases citing and reaffirming the text, and others, see annotations under Rule 2 of Dicks v.

Hatch (10 Iowa 380), Vol. I, p. 707; and see note there found.

Cross reference. See further on this question, annotations under Rule 2 of *Walters v. Steamboat Mollie Dozier* (24 Iowa 191), ante. p. 165.

SOWERS v. PAGE COUNTY, 32 IOWA 530

1. Written Instruments—Construction.—Where the language of a written instrument is clear and unambiguous, it must be given its manifest meaning, p. 532.

Cited in *Barrett v. Mut. Ins. Co.*, 99 Iowa 641, 68 N. W. 907, the court holding that a construction of a written instrument which renders inoperative some of the language used, will not be adopted unless it is unavoidable.

SMITH v. PHELPS, 32 IOWA 537

1. Contracts—Statute of Frauds—Verbal Contract for Sale of Land—Sufficiency of Evidence to Establish.—Under Sec. 4010 of the Code of 1860, an oral contract for the sale of land may be established by the testimony of the party against whom it is sought to be enforced, p. 539.

Special cross reference. For cases citing and sustaining the Rule and many others, see annotations under Rule 2 of *Auter v. Miller* (18 Iowa 405), Vol. II, p. 656.

DAVID v. RICKABAUGH, 32 IOWA 540

1. Public Lands—Constructive Notice—Recording Laws of This State, When Applied.—The recording laws of this state and the doctrine of constructive notice thereby, do not apply to public land derived from the United States until the title finally passes from it, pp. 544, 545.

Reaffirmed in *Rankin v. Miller*, 43 Iowa 18.

Reaffirmed and explained in *Waters v. Bush*, 42 Iowa 256, holding that the laws of the United States control the disposition of the public lands, and the effect to be given instruments issued by the government in the sale of the land, and the rights of parties claiming thereunder.

Cited with approval in *Pinckney v. Pinckney and Collie*, 114 Iowa 443, 87 N. W. 407, not in point.

2. Public Lands—Entry and Certificate of Location of—Rights of Holder—Deed from before Patent Issues.—One who enters public land and obtains a certificate of entry thereof, may sell and deed it to another before a patent issues; and the purchaser or grantee thereby obtains all the rights of his vendor therein or thereto, p. 544.

Reaffirmed in *Sillyman v. King*, 36 Iowa 210, 211.

Cross reference. See further on this question, annotations under *Heirs of Klein v. Argenbright* (26 Iowa 493), ante. p. 353.

GARNER v. CUTTING, 32 IOWA 547

1. Landlord and Tenant—Lien for Rent—When It Attaches—Injunction by Landlord to Restrain Removal, etc., of Property of Tenant.—Under Sec. 2302 of the Code of 1860, the landlord's lien for rent attaches at the commencement of and through the term and is a lien before-hand for the rent as it falls due, and not from the commencement of proceedings to enforce it.

A landlord may, before the rent is due, enjoin the fraudulent removal of property, on which he has a lien, out of the state or beyond his reach; or he may enjoin his tenant from the commission of fraud whereby his lien is about to be injured or destroyed, pp. 549-551, 554.

Reaffirmed as to first paragraph in Gilbert, Hedge & Co. v. Greenbaum, Schroder & Co., 56 Iowa 214, 9 N. W. 183.

Reaffirmed and explained in Martin v. Stearns, 52 Iowa 348, 349, 3 N. W. 45, holding that a landlord may, before his rent becomes due, enjoin his tenant (a merchant) from selling goods on which he has a lien, when such goods are not sold in the usual course of trade.

Reaffirmed and explained in Wallin v. Murphy & Co., 117 Iowa 643, 644, 91 N. W. 931; Gray v. Bremer & Strother, 122 Iowa 112, 97 N. W. 992; Stoaks v. Stoaks, 146 Iowa 64, 124 N. W. 758, holding that a landlord is entitled to an injunction before rent accrues to prevent an attempted sale or removal of property or any other disposition thereof, when he shows that his rights will be thereby interfered with; and that in such cases insolvency of the tenant need not be alleged or proved.

Reaffirmed and explained as to first paragraph in Thorpe Bros. & Co. v. Fowler, 57 Iowa 544, 11 N. W. 5, holding that—under the Code of 1873—it is not necessary to entitle a landlord to a lien for rent, that the rent shall have already accrued; that it is sufficient if he have a contract by reason of which the rent is thereafter to accrue.

Reaffirmed and qualified in Carson v. Electric Light & Power Co., 85 Iowa 47, 51 N. W. 1145, holding that a landlord cannot restrain or enjoin the removal of personal property capable of being easily identified, from the leased premises or premises leased from another in the same city; for the reason that the lien of the landlord attaches so long as such property can be identified, after the rent becomes due, or for six months after the expiration of the term as the case may be: And the lien of the first landlord will be prior to the lien of the landlord owning the premises to which the property is removed.

Reaffirmed and qualified in Clark v. Haynes, 57 Iowa 98, 10 N. W. 293, holding that where a landlord attaches property of a tenant before rent is due, he takes only the rights given by a general attachment.

Reaffirmed and qualified as to first paragraph in Thompson v. Anderson, 86 Iowa 706, 707, 53 N. W. 419, holding that where cattle and hogs are used upon leased premises for the purpose of being fed and

improved in the usual way of stock raising, the lien attaches; or, if kept for sale only and not for improvement, and the premises are leased, in whole or in part, for that purpose, then the lien attaches subject to the rights of purchasers: But if the premises are leased for the purpose of keeping cattle and hogs for sale, and cattle and hogs are kept for that purpose only, and are sold in the ordinary course of business before any action is brought to enforce the lien, it does not attach as against the purchaser.

Cited in Hoyer v. Graham & Schenck, 150 Iowa 68 (dissenting opinion) 129 N. W. 319, the majority court opinion not in point.

Distinguished in Milner v. Cooper & Co., 65 Iowa 191, 192, 21 N. W. 558, holding that injunction, receivership or other similar remedy is not allowed in favor of a landlord for rents to accrue under a lease and to prevent a *solvent* surviving partner from selling the partnership property to wind up the business of the firm.

Cross reference. See further on this question, annotations under Grant v. Whitewell, Marsh & Talbot (9 Iowa 152), Vol. I, p. 555.

SAYRE v. WHEELER, 32 IOWA 559

1. **Laws—Foreign Laws—Presumption as to.**—In an action in this state involving the law of a foreign state, it will be presumed, in the absence of proof to the contrary, that the law of the foreign is the same as that of our own state, p. 561.

Reaffirmed in Davis v. Ch. R. I. P. Ry. Co., 83 Iowa 745, 746 (abstract), 49 N. W. 78; Sieverts v. Nat'l Benevolent Ass'n, 95 Iowa 713, 64 N. W. 672; Varner v. Interstate Exchange, 138 Iowa 204, 115 N. W. 1112.

Distinguished in Wardner, Bushnell & Glessner Co. v. Jack, 82 Iowa 437, 438, 48 N. W. 729, turning on the construction of Secs. 2716, 2717, of the Code of 1873.

Cross references. See further on this question, annotations under Rules 2 & 3 of Taylor, Shipton & Co. v. Runyan & Brown (9 Iowa 522), Vol. I, p. 618; Greasons v. Davis (9 Iowa 219), Vol. I, p. 567.

STEWART v. B. & M. R. R. Co., 32 IOWA 561

1. **Railroads—Liability of in Damages for Stock Killed or Injured.**—Under Chap. 169, Acts of 1862 (9th General Assembly) a railroad company is liable absolutely for stock killed or injured at a place where it has a right to but does not fence, regardless of the question of negligence.

And the fact that the owner *permitted* the stock to run at large is no defense to an action for damages for such killing or injuring, pp. 562, 563.

Reaffirmed in Claus v. Ch. G. W. Ry. Co., 136 Iowa 11, 12, 111 N. W. 17.

Reaffirmed and explained in Smith v. Ch. R. I. & P. R. R. Co., 34 Iowa 97-99, holding that—under Sec. 6, Chap. 169, Acts of 1862—a railroad company is not liable absolutely for killing or injuring stock by its train at a place where it has a right to but has not fenced, when such stock is under the control of the owner; and that in order to constitute such liability, such stock, when killed or injured must be running at large.

Reaffirmed and extended in Fritz v. M. & St. P. R. R. Co., 34 Iowa 338, holding further that under Sec. 6, Chap. 169, Acts of 1862, and Sec. 1289 of the Code of 1873, when a railroad has a right to fence its track, it must do so in such a manner as to turn hogs, failing which it is liable absolutely for killing or injuring them at any such place by its train: And this is the rule although the hogs be running at large contrary to a regulation of the county, or contrary to statute.

Cited in Small v. C. R. I. & P. R. R. Co., 50 Iowa 352, 357 (dissenting opinion), the majority court holding that under Sec. 1289 of the Code of 1873, part of the law of the text, a railroad company is not liable absolutely and in the absence of negligence for damages occasioned by fires caused by its operating its trains; but that the fact that a fire occurs from such cause is only *prima facie* evidence of the company's negligence.

Cross references. See further on this question, annotations under Hinman v. Ch. R. I. & P. R. R. Co. (28 Iowa 491), ante. p. 473; Spence v. Ch. & N. W. Ry. Co. (25 Iowa 139), ante. p. 247.

KRAUSE v. MEYER, 32 IOWA 566

1. Promissory Note—Alteration of—Recovery of Consideration by Holder.—Where after its delivery a promissory note is materially altered and this is done fraudulently and without the knowledge or consent of the maker, a holder thereof cannot recover either upon the note, or upon an implied contract for the consideration; but if such an alteration be made innocently, through mistake, the holder may recover upon an implied contract for the consideration, pp. 568, 569, 570, 571.

Reaffirmed in Clough v. Seay, 49 Iowa 114; Eckert & Williams v. Pickel, 59 Iowa 548, 549, 13 N. W. 709.

Reaffirmed and explained in Sullivan v. Sudisill, 63 Iowa 159, 160, 18 N. W. 856, holding that where, after the execution and delivery of a note, the payee without the knowledge or consent of the original maker and the surety thereon, and without a fraudulent purpose, procures an additional surety thereto, such payee may recover of the original maker or principal the amount of the consideration therefor, with interest at the legal rate per annum, in an action brought therefor: That where a note has been innocently altered, the payee may recover in an action brought against the maker, principal, upon the original consideration.

Cross reference. See further on this question, annotations under *Murray v. Graham* (29 Iowa 520), ante. p. 555; *Hall's, Adm'x, v. McHenry* (19 Iowa 521), Vol. II, p. 758.

2. Partnership—Evidence Not Sufficient to Establish.—The fact that an agent or other person employed by a partnership to render services, receives a part of the profits as compensation in addition to his salary, will not make him a partner, p. 569.

Distinguished in *Johnson Bros. v. Carter & Co.*, 120 Iowa 360, 361, 94 N. W. 852, holding that in order to constitute a partnership there must be an express agreement, or one implied from circumstances, for the parties to the share both the profits and the losses of the enterprise; but that proof of the agreement to share the profits *prima facie* establishes the partnership.

STATE v. HAMILTON, 32 IOWA 572

1. Appeal—Error in Instructions—Insufficient Record—Affirmance.—Error in the giving or the refusing instructions will not be ground for reversal, when the record upon appeal does not contain all the instructions given, p. 574.

Reaffirmed in *Moody v. St. P. & S. C. R. R. Co.*, 41 Iowa 285, 286.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

2. Trial—Evidence—Witnesses, Impeachment of by Contradictory Declaration, etc.—Practice.—Before the declarations or statements of a witness, who is not a party, which are contradictory of his testimony are receivable to impeach or contradict it, his attention must be directed to them and to the time, place and circumstances when and under which they were made, while he is testifying, and in order that he be allowed the opportunity to deny having made, or to admit and explain them, pp. 574, 575.

Reaffirmed and extended in *Browning v. Gosnell*, 91 Iowa 452, 453, 59 N. W. 342, holding further that the rule is equally applicable where a party to an action is sought to be impeached *as a witness* by contradictory statements or declarations, and where they are not sought to be proven against the party on other competent grounds.

Reaffirmed and extended in *Swanson v. French*, 92 Iowa 698, 61 N. W. 407, holding further that a witness cannot be impeached by proof of contradictory but immaterial statements.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

ABEY v. ABEY, 32 IOWA 575

1. Divorce and Alimony—Alimony—Terms, etc., on Which to be Allowed.—While in an action for divorce, the wife, who has been

wronged should be fully protected, yet it should be done so as not to oppress unnecessarily or dishearten the husband, p. 577.

Reaffirmed in Zuver v. Zuver, 36 Iowa 196-198.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

McWILLIAMS v. WEBB & SON, 32 IOWA 577

1. Assignment of Particular Fund—Order for—Effect of Notice to Drawee—Rights of Subsequent Attachment Creditor of Drawer.

—An order drawn on the whole of a particular fund amounts to an equitable assignment of the fund, and after notice to the drawee thereof, it binds the funds in his hands.

And this rule applies in favor of such an assignee and against a subsequent attachment creditor of the drawer, pp. 579, 580.

Reaffirmed in What Cheer Sav. Bank v. Mowery, 149 Iowa 119-122, 128 N. W. 9.

Reaffirmed and explained in Des Moines County v. Hinkler & Norris, 62 Iowa 643, 645, 17 N. W. 918; Metcalf v. Kincaid, 87 Iowa 445, 43 Am. St. Rep. 391, 54 N. W. 868; Hoffman v. Smith, 94 Iowa 498, 63 N. W. 183; Ruthven Bros. v. Clarke, 109 Iowa 28, 29, 79 N. W. 455; Seymour v. Aultman & Co., 109 Iowa 298, 80 N. W. 402, holding—as does the present case—that no particular form of words is required to create an equitable assignment of a fund; that anything which evinces an intent to do so is sufficient: And holding also,—as does the present case—that an assignment of a debt or fund may be either oral or written; and that where such an assignment is in writing and the instrument does not manifest the intention of the parties, the fact that it was intended as an assignment may be shown by evidence *aliunde* or even by parol.

Reaffirmed and explained in Hipwell v. Nat'l Surety Co., 130 Iowa 664, 105 N. W. 321, holding that an order for the payment of a specific sum out of a fund larger in amount will operate as an equitable assignment thereof *pro tanto*.

Reaffirmed and qualified in Foss v. Cobler, 105 Iowa 731, 732, 75 N. W. 517, holding that a mere promise or agreement on the part of a debtor to pay a certain debt out of a particular fund does not amount to an equitable assignment; but that in order to constitute it there must be an unequivocal and irrevocable order to pay out of it, or such a transfer of the fund to the extent of the debt.

Distinguished and narrowed in First Nat'l Bk. of Canton v. Du-buque S. W. Ry. Co., 52 Iowa 380, 35 Am. Rep. 280, 3 N. W. 397, holding that a draft drawn on a drawee who is not at the time indebted to the drawer and will only be so later upon the performance of a condition by the latter, does not amount to an equitable assignment of any part of the debt so subsequently becoming due.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

Cross reference. See further in this connection, annotations under Rule 1 of *Moore v. Lowrey, Garnishee* (25 Iowa 336), ante. p. 274.

STATE *v.* McNALLY, 32 IOWA 580

1. **Homicide—Indictment Charging Murder in the Second Degree—Trial for First Degree, Reversible Error.**—Where an indictment charges only murder in the second degree, it is reversible error to put accused upon trial for murder in the first degree thereunder, although he may be duly convicted upon the trial, of murder in the second degree, p. 582.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Rule 1 of *State v. Boyle* (28 Iowa 522), ante. p. 478.

FARWELL & CO. *v.* SALPAUGH, 32 IOWA 582

1. **Debtor and Creditor—Payment—When Giving of Order, Note, etc., by Debtor, Extinguishes Prior Indebtedness or Is Payment of.**—The giving and accepting of an order, bill of exchange or promissory note for a prior indebtedness will not be regarded as payment thereof, unless there be an express agreement between the parties to that effect.

But where a creditor accepts such an order on a third person in payment of his debt, it has such effect upon being accepted by the drawee, pp. 585, 586.

Reaffirmed in *Beach and Weld v. Wakefield*, 107 Iowa 573, 574, 76 N. W. 690.

Reaffirmed and explained in *Farwell v. Grier*, 38 Iowa 87; *Bank of Monroe v. Gifford*, 79 Iowa 308, 44 N. W. 561, holding that the general rule is, that the giving of a bill of exchange, or a promissory note for goods sold, or for an existing contract, is not to be regarded as payment of the indebtedness, unless there is an express agreement to that effect.

Reaffirmed and extended in *Huse v. McDaniel*, 33 Iowa 408, 409; *Hunt & Co. v. Higman*, 70 Iowa 410, 411, 30 N. W. 771, holding further that the transfer of a note or bill of a third party on account of an existing debt, in the absence of an agreement that it shall be taken in absolute payment, operates only as a conditional payment, and does not defeat recovery upon the original indebtedness in case of non-payment of the paper of the third party.

Reaffirmed and extended in *Heively v. Matteson*, 54 Iowa 510, 6 N. W. 734; *Zook v. Thompson*, 111 Iowa 466, 82 N. W. 931, holding further that the giving of a new note for a note secured by mortgage or the giving of a note for the purchase price of land, does not release the lien of the mortgage, or of the vendor, in the absence of an express agreement to that effect.

Reaffirmed and qualified in Griffin v. Erskine and Andrews, Rec'rs, 131 Iowa 451, 455, 9 Am. & Eng. Ann. Cas., 1193, 109 N. W. 16, holding that where a bank to whom a note is sent for collection receives a check or draft in payment thereof, and such check or draft is thereafter paid, it constitutes a payment of the note.

Cross reference. See further on this question, annotations and cross references under Rule 2 of McLaren v. Hall (26 Iowa 297), ante. p. 327.

PHILLIPS v. POTTER, 32 IOWA 589

(Abstract.)

1. Voluntary Conveyances—When Not Fraudulent as to Subsequent Creditors of Grantor.—A good faith voluntary conveyance, is valid as to subsequent creditors of the grantor, and is not affected by his later becoming financially embarrassed or insolvent, p. 590.

Reaffirmed in Everist v. Pierce, 107 Iowa 45, 46, 77 N. W. 508.

Cross reference. See further on this question, annotations and cross references under Lyman v. Cessford (15 Iowa 229), Vol. II, p. 330.

MASON v. GREEN, 32 IOWA 596

(Abstract.)

1. Practice—Pleadings—Interrogatories Attached to, Nature of.—Interrogatories attached to a pleading and to be answered by the adverse party under oath must—under the Code of 1860—present questions, the answers to which are material to the issue to be tried, pp. 598, 599.

Reaffirmed in McFarland v. City of Muscatine, 98 Iowa 201, 67 N. W. 234,—under Sec. 2693 of the Code of 1873, corresponding to the section of the Code of 1860 referred to in the text.

(Note.—There are other cases sustaining but not citing the text.—Ed.)

Annotations to Decisions Reported in Volume 33 Iowa.

STATE *v.* JONES, 33 IOWA 9

1. Criminal Law—"Confession" and "Admission" Defined—Distinction between.—In the criminal law a confession is the voluntary declaration, made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in it. All other statements of an accused person are, upon the trial of a criminal prosecution, to be construed as admissions only, pp. 11, 12.

Reaffirmed in State *v.* Novak, 109 Iowa 727, 79 N. W. 469; State *v.* Abrams, 131 Iowa 484, 108 N. W. 1043.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

DESMOND *v.* BROWN, 33 IOWA 13

1. Libel and Slander—Slander—Construction of Language Used.—In an action of slander the alleged slanderous words should be construed in the sense in which their hearers understood them, p. 15.

Reaffirmed and explained in Prime *v.* Eastwood, 45 Iowa 641, holding that in an action of slander the words are to be construed in the sense in which, in the light of all explanatory circumstances known to speaker and hearer, they are calculated to impress the hearer's mind and will naturally be understood.

Cross references. See further on this question, annotations under McCaleb *v.* Smith (22 Iowa 242), ante. p. 26; Barton *v.* Holmes (16 Iowa 252), Vol. II, p. 432.

SMITH & NELSON *v.* BRISTOL, 33 IOWA 24

1. Contract to Erect Building—Implied Stipulation as to Workmanship.—Where a contract for the erection of a building does not stipulate as to the kind or quality of the labor, the law implies that it is to be done in a workmanlike manner, p. 25.

Reaffirmed and explained in Kilbourne, Jenkins & Co. *v.* Jennings & Co., 40 Iowa 475, holding that an agreement to erect a building, and to use material of good quality and have the work done by good mechanics, in good taste and style and in a substantial manner, is fully equivalent to an agreement for having it done in a good and work-

manlike manner; and that if nothing is said in such a contract as to the manner or quality of the work, the law implies this foregoing provision.

RICORD v. JONES, 33 IOWA 26

1. Written Instruments—Omission of United States Revenue Stamp—What Renders Instrument Invalid or Inadmissible in Evidence—Burden of Proof.—The omission of a United States Revenue Stamp from a written instrument required to be affixed by the Act of Congress of 1864, does not render it invalid or inadmissible in evidence unless it was omitted with a fraudulent design to evade the law; and the burden of proof is on the party claiming its invalidity or objecting to its admission in evidence, to prove such fraudulent intent. The case of *Hugus v. Strickler*, 19 Iowa 416, is overruled, pp. 27, 28.

Special cross reference. For cases citing the text, and others, see annotations under Rule 2 of *Mitchell v. Home Ins. Co.* (32 Iowa 421), ante, p. 760.

STAPLETON v. KING, 33 IOWA 28, 11 AM. REP. 109

(Later appeal 40 Iowa 278.)

1. Evidence—Written Contracts—Parol Evidence Inadmissible to Explain, Vary, etc.—Receipt an Exception.—Parol evidence is inadmissible to explain, vary, or control a written contract.

But such evidence is admissible to explain, vary, add to or control a receipt, pp. 31, 34, 35.

Reaffirmed in *Marks v. Cass County Mill & Elevator Co.*, 43 Iowa 148; *Jones v. Jones*, 46 Iowa 472; *Bigelow v. Wilson*, 77 Iowa 606, 42 N. W. 502; *Jones v. Foreman*, 93 Iowa 203, 61 N. W. 847; *Mounce v. Kurtz*, 101 Iowa 195, 70 N. W. 120.

Reaffirmed and explained in *Williamson v. Reddish*, 45 Iowa 551, holding that a paper providing that a lost note if ever found shall be null and void, is a receipt, and may be explained, etc., as in the text provided.

2. Partnership—Joint Contract to Perform Services, etc.—When Treated as Partnership Contract as to Third Persons—Power of One Partner to Bind Other.—Where two persons enter into a joint contract to care for sheep to receive equal shares of the compensation therefor, they will be regarded as partners in the transaction in favor of the other party to the contract and third persons; and one of them may bind the other by acts in relation to the transaction, pp. 35, 36.

Distinguished in *Ruppert v. C. O. & St. J. R. R. Co.*, 43 Iowa 492, 493, holding that where damages for a railroad right of way are jointly assessed to two persons, each of whom owns one-half of the land, and one of them thereafter accepts one-half the sum of the dam-

ages and executes a deed to a right of way over the land, the other owner may subsequent to such transaction prosecute an appeal for the purpose of having another trial of the amount of his one-half of the damages.

GOWER v. DOHENEY, 33 IOWA 36

1. Unrecorded Deed, Mortgage or Equity to or in Land—Sale under Subsequent Judgment—Purchase by Judgment Creditor without Notice, Rights of.—Where a judgment creditor buys land of the judgment debtor at a sheriff's sale under his judgment and without actual or constructive notice of a deed, mortgage, or equity to or in another, made or given before the rendition of his judgment, he takes the land as any other *bona fide* purchaser and free from such prior deed, mortgage, or equity, unless there are equitable circumstances which give the holder of the prior instrument or equity the superior right, pp. 39, 40.

Reaffirmed in Wright v. Howell, 35 Iowa 298; Foreman v. Hingham, 35 Iowa 386; Butterfield v. Walsh, 36 Iowa 536, 537; Rogers v. Hussey, 36 Iowa 666; Weaver v. Carpenter, 42 Iowa 347; Bear v. B. C. R. & M. R. R. Co., 48 Iowa 628; Ettenheimer v. Northgroves, 75 Iowa 29, 30, 39 N. W. 121; Pinckney v. Collie 114 Iowa 443, 87 N. W. 407; Hendryx v. Evans, 120 Iowa 315, 94 N. W. 854.

Reaffirmed and extended in Jones v. Brandt, 59 Iowa 342, 13 N. W. 859, holding further that a purchase at a sheriff's sale of land, and without notice, is protected against latent equities therein.

Reaffirmed and varied in Cooley v. Wilson, 42 Iowa 428, holding that the rule applies where the attorney of the judgment creditor buys the land at such a sale.

Reaffirmed and varied in Frazier v. Crafts, 40 Iowa 112-114, holding that a judgment debtor whose real estate has been sold to the judgment plaintiff in satisfaction of the judgment before notice of appeal, cannot, after the judgment under which the sale occurred has been reversed, and the cause has been remanded for a new trial, and after the sheriff's deed to the judgment plaintiff has been recorded, sell the real estate to a third party and convey a valid title thereto, notwithstanding judgment is again rendered on a new trial for the full amount of the former judgment.

Cited with approval in Wood, Brown & Co. v. Young, 38 Iowa 108, turning on other but analogous questions.

Cited in Koch v. West, 118 Iowa 472, 96 Am. St. Rep. 394, 92 N. W. 664, the court holding that a purchaser (not the judgment creditor) of land at an execution sale without notice of a prior unrecorded deed or mortgage thereto or thereon takes it free therefrom—and that this rule applies in favor of one claiming under or through such purchaser.

Cross references. See further on this question, annotations under *Evans v. McGlasson* (18 Iowa 150), Vol. II, p. 601; see also, annotations under *Twogood v. Franklin* (27 Iowa 239), ante. p. 398.

MUSCATINE COUNTY *v.* CARPENTER, 33 IOWA 41

1. Contracts in Violation of Statute or Common Law, Void.—

Contracts made in violation of law, or upon an illegal consideration, or which have for their object anything which is repugnant to the Common Law, or contrary to the provisions of a statute are void, p. 43.

Distinguished in *Green v. Schoenhofen Brew. Co.*, 103 Iowa 257, 72 N. W. 657, a case involving a lawful contract for the sale of beer in original packages.

Cross references. See further on this question, annotations under *Allison v. Hess* (28 Iowa 388), ante. p. 464; *Boardman & Brown v. Thompson* (25 Iowa 487), ante. p. 289; *Pike v. King*, (16 Iowa 49), Vol. II, p. 403; *Reynolds v. Nichols & Co.* (12 Iowa 398), Vol. II, p. 67.

BOONE *v.* MITCHELL, 33 IOWA 45

1. Actions—Practice—Continuance—Discretion of Trial Court

—Abuse—Reversal.—The trial court has a judicial discretion—under the Code of 1860—in the matter of granting or refusing a continuance in a civil action because of the absence of a witness; and his ruling on such a motion will not be ground for reversal, except in case of a clear case of abuse of that discretion, pp. 46, 47.

Reaffirmed in *Peck v. Parchen*, 52 Iowa 50, 2 N. W. 600, under the Code of 1873.

Reaffirmed and explained in *Cheney v. McColloch*, 104 Iowa 252, 73 N. W. 581, holding that an application for a continuance is addressed peculiarly to the sound discretion of the judge, and his ruling thereon will not, as a general rule, be interfered with, unless it clearly appears that this discretion has been abused, and an injustice done thereby.

PHILO *v.* ILLINOIS CENTRAL R. R. Co., 33 IOWA 47

1. Railroad Companies—Death of Employee by Negligence of Co-Employee—Action by Personal Representative.—Where an employe of a railroad company is killed by the negligence of a co-employe while operating its train, the railroad is liable in damages therefor under Chap. 169 of the Acts of 1862 (9th General Assembly); and the personal representative of the decedent may sue therefor under such law and Sec. 4111 of the Code of 1860, pp. 49-51.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Rule 1 of *Donaldson et al, Adm'rs, v. M. & M. R. R. Co.*, (18 Iowa 180), Vol. II, p. 627.

Cross reference. See further on this question, annotations under *Sherman v. Western Stage Co.* (24 Iowa 515), ante. p. 218.

GREENLEAF, ADM'R, *v.* DUBUQUE & SIOUX CITY R. R. Co., 33 Iowa 52

1. Negligence—When Question of Law for Court and When Question of Fact for Jury.—In an action for damages for the death of one claimed to have been caused by the negligence of the defendant, when the evidence is undisputed and conclusively shows that the defendant was guilty of no negligence, or that decedent was guilty of such contributory negligence as will defeat recovery by his administrator (the plaintiff), the question is one of law for the court, and he may take the case from the jury; but where the facts are disputed, or the evidence is conflicting, the question must be left to the jury to decide, p. 57.

Reaffirmed and explained in *Lichtenberger v. Town of Meriden*, 91 Iowa 48, 49, 58 N. W. 1059; *Matthieson v. B. C. R. & N. Ry. Co.*, 125 Iowa 95, 100 N. W. 53, holding that in an action for damages by reason of negligence, where the facts are disputed, or where more than one inference may be drawn therefrom, the case is for the jury.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

2. Master and Servant—Defective Machinery, etc.—When Servant Does Not Assume Risks—Knowledge of Defects, Damages, etc.—When Not Contributory Negligence.—The servant does not by simply remaining in the employ of his master, with knowledge of defects in the machinery which he is obliged to use, assume the risks attendant upon the use of such machinery. Such result follows, only, when he remains in the master's service without objection or protest against the continuance of the defects.

The fact that a servant has knowledge of defective machinery, dangerous places or other dangers of his employment does not necessarily constitute contributory negligence, if he is killed or injured while acting in the discharge of a duty of his employment requiring his exclusive attention, and that he act with rapidity and promptitude; and in such cases the question is for the jury, pp. 58, 59.

Reaffirmed as to first paragraph in *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 449, 104 Am. St. Rep. 354, 100 N. W. 347.

Reaffirmed as to second paragraph in *Perigo v. C. R. I. & P. R. Co.*, 55 Iowa 329, 7 N. W. 628; *Baldwin v. St. L., Keokuk & N. W. Ry. Co.*, 63 Iowa 212, 18 N. W. 884; *Collins v. B. C. R. & N. Ry. Co.*, 83 Iowa 351, 49 N. W. 850; *McLeod v. C. & N. W. Ry. Co.*, 104 Iowa 144, 145, 73 N. W. 615.

Reaffirmed and explained in *Muldowney v. Ill. Cent. R. R. Co.*, 39 Iowa 619-621, holding that when an employe has knowledge, or has the means of acquiring knowledge by the exercise of ordinary

care and diligence, of the defects and imperfections in the machinery or cars about or upon which he is employed, and continues in his employer's service without objecting to, or protesting against the use of such defective or imperfect cars or machinery, he will be held to have assumed all the risks incident to the use of the cars and machinery in such defective condition.

Reaffirmed and explained in Perigo v. C. R. I. & P. R. R. Co., 52 Iowa 277, 278, 3 N. W. 44, holding that an employe who knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby.

Reaffirmed and explained in Stoutenburg v. Dow, Gilman, Hancock Co., 82 Iowa 184, 47 N. W. 1041, holding that when an employe, in order to perform his duty, is required to use defective machinery, and makes complaint thereof to his employer, who promises to repair the defect, the servant can recover for an injury caused thereby within such period of time after the promise as would not preclude all reasonable expectation that the promise might be kept; and this promise may be express or implied.

Reaffirmed and explained in Harper v. B. C. R. & N. Ry. Co., 88 Iowa 413, 45 Am. St. Rep. 242, 55 N. W. 318, holding that a general rule is that a person who accepts employment with knowledge of its risks does it at his peril, and has no claim on his employer for indemnity on account of such risks; and if the employe remains in the service of his employer without objection, and without promise of a change, after obtaining knowledge of special hazards not known to him when the service was entered, he will be deemed to have waived the right to compensation for injuries which he may sustain by reason of such hazard: But the mere technical fact of the servant's knowledge of a defect is not sufficient to exonerate the master, if, for any reason, the servant forgets it, and is not in fault in forgetting it, at the precise time he suffers thereby; and that the servant's rights are not prejudiced by his forgetfulness or failure to observe a defect, under the influence of sudden alarm or of urgent demand for speed, or if his duties are such as necessarily to absorb his whole attention, leaving him no reasonable opportunity to look for defects.

Distinguished in Tuffree v. Town of State Center, 57 Iowa 540, 541, 11 N. W. 2, holding that one who voluntarily drives a horse over an obstacle while looking in another direction, without any exigency for such carelessness, is guilty of such contributory negligence as will defeat a recovery for injuries thereby occasioned.

Distinguished as to second paragraph in Sedgwick v. Ill. Cent. R. Co., 76 Iowa 342, 343, 41 N. W. 36, holding that where a brakeman

voluntarily continues to attempt to remove a coupling pin after the train is in motion, he assumes all risks from all the dangers in any way attendant thereon.

Cross references. See further on this question, annotations under Kroy, Adm'r, v. Ch. R. I. & P. R. R. Co., (32 Iowa 357), ante. p. 752; Greenleaf, Adm'r v. Ill. Cent. R. R. Co., (29 Iowa 14), ante. p. 489.

STUART, ASSIGNEE, v. HINES & EAMES, 33 IOWA 60

1. Insolvent Debtor—Bankruptcy Proceedings—Effect—Jurisdiction of Federal and State Courts.—After a petition in bankruptcy is filed in the United States District Court (under the United States Bankrupt Law in force in 1871), no lien can be obtained by a creditor on the property of the bankrupt by attachment or other proceedings in a state court, p. 100.

Reaffirmed in Smith & Crittenden v. Price, 60 Iowa 91, 14 N. W. 127.

Distinguished in Hatch v. Seeley, 37 Iowa 496, holding that under the law of the text, Sec. 14 of the Bankrupt Law—United States Statutes at Large, Vol. 14, p. 522—an attachment made prior to the period of four months next preceding the commencement of proceedings in bankruptcy is not dissolved by such proceedings; and the lien of the attachment may be enforced by any appropriate proceedings which do not involve a judgment *in personam* against the bankrupt; and that a judgment to be enforced against the property thus attached may be entered even though a discharge has been granted and is pleaded in bar of the action, as in this case.

Distinguished in Perry & Townsend v. Miller, 54 Iowa 284, 5 N. W. 733, holding that an existing lien under a judgment in the state court is not affected by proceedings in bankruptcy.

2. Pleadings—Counterclaim Defined.—Under Sec. 2889 of the Code of 1860, a counterclaim is a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them.

Mere defenses or matters defeating the plaintiff's cause of action, but not entitling the defendant to additional relief, do not constitute a counterclaim, p. 101.

Reaffirmed and explained in Bardes v. Hutchinson, 113 Iowa 614, 85 N. W. 798, holding that under Sec. 3570 of the Code of 1897, corresponding to the section of the text, a counterclaim, proper, presents matter upon which an original cause of action might be brought by defendant.

Reaffirmed and explained in Stewart v. Gorham, 122 Iowa 676, 98 N. W. 515, holding that under Sec. 3570 of the Code of 1897, corresponding to the section of the text, a cross-bill in order to constitute a counterclaim must contain an independent cause of action

in favor of the defendant against the plaintiff and an appropriate prayer for relief thereon; but that it is not material that the cause stated involves, to a greater or less extent, the subject-matter of the cause of action as stated by plaintiff in his petition, but it must contain within itself the essential elements of a cause of action: And holding, also, that, under Sec. 3766 of the Code of 1897, if there be a counterclaim or cross-bill filed, such is not abated by the failure of plaintiff to appear, or the dismissal of his action, and the defendant may proceed to trial on such counterclaim or cross-bill.

Reaffirmed, explained and qualified in Muir v. Miller, 82 Iowa 708, 709, 47 N. W. 1011, holding that where facts pleaded are intended as defensive matter only, but relief is asked which such defensive facts would authorize, it will not be regarded as a counterclaim; but that under Secs. 2659, 2891 of the Code of 1873, a cross-demand is new matter pleaded by the defendant against the plaintiff, and on which the defendant might have brought an action when the suit was commenced; and that a cross-demand is a counterclaim.

ATHEARN v. INDEPENDENT DISTRICT OF MILLERSBURG, 33 IOWA 105

I. School Districts—Contract by Board of Directors of—Failure to Enter of Record—Effect.—A contract entered into by the board of directors of a school district and otherwise legal and valid, is not affected by a failure to record it in the books of the board or district officials, pp. 107, 108.

Reaffirmed in Hull v. Independent Dist. of Aplington, 82 Iowa 690, 10 L. R. A. 273, 46 N. W. 1054.

Reaffirmed and explained in Selley v. American Lubricator Co., 119 Iowa 596, 93 N. W. 591, holding that ordinarily the recorded minutes of the proceedings of a corporation are the best evidence of its doings; but one who enters into a contract with such a corporation, and performs labor under such contract, is not to be defeated simply because the corporation failed to make its proceedings of record; and if no minutes are kept, parol evidence is admissible to show what was in fact done, and no one is to be prejudiced through failure of the recording officer to do his duty.

Reaffirmed and extended in Bellmeyer v. Independent Dist. of Marshalltown, 44 Iowa 566, 567; Zalesky v. Iowa State Ins. Co., 102 Iowa 514, 515, 70 N. W. 188, holding further that such a contract may be either verbal or in writing, if within the scope of the powers granted to the board of directors; and that where no record is kept of the contract, or it is verbal, parol evidence is admissible to prove it.

Distinguished in Mann v. Independent Sch. Dist. of Le Grand, 52 Iowa 132, 2 N. W. 1007, holding that parol evidence is inadmissible to vary or extend the terms of a written contract with a teacher.

2. School Districts—Contract by Board of Directors, etc., without Authority—Ratification—Estoppel.—Where a board of directors or other officers of an independent school district enter into a contract without legal authority so to do, (in this case with a teacher) and thereafter allow the other contracting party to partially perform his contract and pay him for his services so done, it amounts to a ratification of the contract by such board and the district, and the district is thereby estopped to subsequently deny the validity of the contract, pp. 109, 110.

Reaffirmed in Cook v. Independent School District of North McGregor, 40 Iowa 445, 446 (cited in dissenting opinion 447); Place v. Dist. Township of Colfax, 56 Iowa 576, 9 N. W. 918.

Reaffirmed and extended in Johnson v. Sch. Corp. of Cedar, 117 Iowa 326, 90 N. W. 715; Bobzin v. Gould Valve Co., 140 Iowa 749, 750, 118 N. W. 42, holding further that, either at law or in equity, the fact that a contract is contrary to public policy, or otherwise illegal, does not relieve a corporation (municipal or private) from liability thereunder, when it accepts and retains its benefits.

Reaffirmed and explained in Bellows v. Dist. Township of West Fork, 70 Iowa 322, 30 N. W. 583, holding further that where a party erects a school-house under an unauthorized contract with a member of the board of directors of a district township, but with full knowledge by and without objection from the president and rest of the board, and the building is appropriated to the use of the district, the party so erecting may recover of the district the value of his services or labor and of the materials furnished.

Reaffirmed and explained in Hull v. Independent Dist. of Aplington, 82 Iowa 688-691, 10 L. R. A. 273, 46 N. W. 1054, holding that when the board of directors of an independent school district empower the president thereof to make contracts with teachers to be later approved by the board, and the president thereupon enters into a written contract with a teacher and keeps it in his possession, and the board, with full knowledge allows the teacher to partially perform his contract, it is a ratification or approval, and the contract is binding.

Cross reference. See further on this question, annotations under Rule 3 of Dubuque Female College v. Dist. Township of the City of Dubuque (13 Iowa 555), Vol. II, p. 186.

3. School and Independent School Districts—Powers of Sub-Directors of District Township and Board of Directors of Independent School District—Contracts with Teachers.—Under Chap. 172, Acts of 1862 (9th General Assembly), the sub-directors of a district township are authorized to enter into contracts with teachers; and the powers of the board of directors of an independent school district in the matters of the employment of teachers are governed by and are co-extensive with those of such sub-directors.

The fact that a contract with a teacher is entered into by the board of directors, or sub-directors, as the case may be, when not acting in the capacity of a *board* does not affect its binding effect as a contract, pp. 108, 109.

Reaffirmed as to first paragraph in Independent District of Eden, No. 2, v. Rhodes, 88 Iowa 575, 576, 55 N. W. 525.

Reaffirmed and extended in Hull v. Independent Dist. of Aplington, 82 Iowa 688-691, 10 L. R. A. 273, 46 N. W. 1054, holding that when the board of directors of an independent school district empower the president thereof to make contracts with teachers to be later approved by the board, and the president thereupon enters into a written contract with a teacher and keeps it in his possession, and the board, with full knowledge, allows the teacher to partially perform his contract, it is a ratification or approval, and the contract is binding.

Distinguished in Gambrell v. Dist. Township of Lenox, 54 Iowa 418, 6 N. W. 694, holding that under Sec. 1753 of the Code of 1873, a contract with a teacher by the sub-directors of a district township must, in order to be valid, be approved by the president and reported to the board of directors thereof—the question of ratification or estoppel as set out in Rule 2 above not, however, being raised.

UFFORD v. WILKINS, 33 IOWA 110

1. Boundaries—Conveyances and Grants of Land—Fixed Monuments and Definite Description Control Quantity, etc.—Definite description, and fixed monuments in a conveyance or grant of land controls quantity and distances, pp. 112, 113.

Reaffirmed and explained in Root v. Town of Cincinnati, 87 Iowa 204, 205, 54 N. W. 207, holding that the true corners of land derived from the general government are where the United States surveyors in fact establish them, whether such location is right or wrong, as shown by subsequent surveys: That this rule applies to a town plat; and where there is a discrepancy between the courses and distances indicated by the plat, and the survey as actually made, the latter controls; and that the deed of a lot by number will be held to convey the lot as it is bounded by the lines actually run by the survey, when they can be ascertained.

Reaffirmed and explained in Dashiell v. Harshman, 113 Iowa 288, 85 N. W. 87, holding that independent of an express covenant as to quantity in a grant, patent, or conveyance of land, a statement as to the number of acres conveyed will yield to the actual area, as ascertained by reference to the plat, field notes, monuments, or other certain description of the premises conveyed.

Reaffirmed and explained in Rowell v. Weinemann, 119 Iowa 258, 97 Am. St. Rep. 310, 93 N. W. 279, holding that the line actually run by the original government surveyors become the true boundaries, and,

if they can be ascertained through monuments erected by these officials, they will control, and courses, distances, measurements, plats, and field notes must all yield.

Reaffirmed, explained and extended in Rowland v. Brown, 75 Iowa 682, 37 N. W. 404, holding that when the quantity of land mentioned in a deed as a part of the description is inconsistent with the area as shown by other certain description, the statement of quantity will be rejected—and holding further that the rule applies to a description of land in a notice—under the Code of 1873—to redeem from a tax sale thereof.

Cited in Barringer v. Davis, 141 Iowa 434, 120 N. W. 70, the court holding that the original survey of land even though incorrect is conclusive upon parties who deal with the land relying upon the accuracy and correctness thereof.

Unreported citation 138 N. W. 449.

Cross references. See further on this question, annotations under Sayers v. City of Lyons (10 Iowa 249), Vol. I, p. 678; and see also, in this connection, annotations under Kraut v. Crawford (18 Iowa 549), Vol. II, p. 679.

CEDAR FALLS AND MINNESOTA R. R. Co. v. RICH, 33 IOWA 113

1. Contracts—Subscription to Aid in Construction of Railroad, Condition in—Substantial Performance.—Where a written subscription to aid in the construction of a railroad is upon a condition to be performed by the company—as that it build a depot at a certain town or other place—a substantial compliance with such condition by the company is all which is required to render the contract binding, pp. 115, 116.

Reaffirmed in Courtwright v. Strickler, 37 Iowa 385.

Reaffirmed and extended in Meader v. Lowry, 45 Iowa 687, 688; Whitney v. Ch., Anamosa & N. Ry. Co., 133 Iowa 511, 110 N. W. 913, holding further that a substantial compliance with the conditions on which a tax to aid in the construction of a railroad is voted, is all which is required on the part of the company to render the tax valid and legal.

Reaffirmed and varied in Fitzgerald & Remick v. Britt, 43 Iowa 500, 501, holding the rule applicable to a condition in a conveyance of land to a railroad company, and that a substantial performance thereof by the company is all that is required.

Reaffirmed and varied in Des Moines & Denver Land & Tree Co. v. Polk Co. Homestead & Trust Co., 82 Iowa 668, 45 N. W. 775, holding the rule to apply to a condition in a contract to do certain labor (in this case to plant trees).

MORGAN v. SMALL, 33 IOWA 118

1. Actions—Pleading—Petition—Form of—Failure to State County and Court.—Under Sec. 2875 of the Code of 1860, the petition must state the name of the county and the court in which the action is brought. And where a petition states the "circuit court" as the court in which the action is brought, and the clerk without a change in the petition indorses on the back thereof "change to district court," a judgment by default in the latter court on a service of original notice to appear therein is, at least, irregular and will be set aside on motion, under Sec. 3499 of the Code of 1860, p. 119.

Reaffirmed and explained in Jordan v. Brown, 71 Iowa 423, 424, 32 N. W. 452, holding that when a petition is addressed to the circuit court, the district court has no jurisdiction to render judgment thereon, and all proceedings therein, as well as the judgment and proceedings thereunder are void: And that in such case the indorsements on the wrapper of the petition are no part thereof, and are of no effect to confer jurisdiction on the district court, or to render the proceedings, etc., valid.

Reaffirmed and extended in Garretson v. Hays Bros., 70 Iowa 20, 29 N. W. 787, holding further that a paper entitled a "synopsis of petition" and containing the name of no county or court, is of no effect when filed in any court.

Cross reference. See further on this question, annotations under Smith v. Watson (28 Iowa 218), ante. p. 444.

DEAN v. MOREY, 33 IOWA 120

1. Sales of Personal Property—Patent Defects, etc.—Caveat Emptor.—A purchaser of personal property is, in the absence of express warranty, chargeable with knowledge of defects in the property purchased which ordinary observation and ordinary diligence would discover; and the seller is under no duty to call attention thereto.

So where the buyer of a young colt fails to look into its mouth to see whether or not it is a "cribber," relying on his knowledge and judgment that a colt so young would not be addicted to the habit, he cannot maintain an action against the seller by reason of his failure to disclose such fact, p. 122.

Reaffirmed as to first paragraph in Burnett v. Hensley, 118 Iowa 581, 92 N. W. 703.

(Note.—There are other cases sustaining, but not citing the first paragraph of the text.—Ed.)

DIXON v. STEWART, 33 IOWA 125

1. Trial—Instructions—Instruction Not Sufficiently Explicit Not Error—Practice.—Where an instruction given is not sufficiently explicit and does not fully develop a party's cause of action or defense,

it is not reversible error; but it is the duty of the party to offer one curing the defect, p. 128.

Reaffirmed in Koehler v. Wilson, 40 Iowa 185, 186; Gwinn v. Crawford, 42 Iowa 67, 68; Hill v. Glenwood, 124 Iowa 483, 100 N. W. 524.

Cited in Roberts v. Morrison, 75 Iowa 325, 326, 39 N. W. 522, the court holding that although an instruction or a portion of the charge to the jury be error if considered alone, yet if it be correct or not prejudicial when considered with the other instructions or charge, it will not be cause for reversal.

Cross references. See further on this question, annotations under State v. Brainard (25 Iowa 572), ante. p. 296; Rule 2 of Owen v. Owen (22 Iowa 270), ante. p. 30; Rule 4 of State v. Tweedy (11 Iowa 350), Vol. I, p. 824.

2. Libel and Slander—Slander—Construction of Language Sued On.—In an action of slander the words published are not to be construed in the sense, absolutely, in which the hearers understood them, but they are to be understood in the sense in which, in the light of all explanatory circumstances known to speaker and hearer, they are calculated to impress the hearer's mind, and will naturally be understood, p. 129.

Reaffirmed in Prime v. Eastwood, 45 Iowa 641.

Distinguished and narrowed in Anderson v. Hart, 68 Iowa 402, 403, 27 N. W. 290, holding that when a libelous publication does not on its face, or by way of innuendo or otherwise refer to a certain person, evidence as to whom the persons to whom it was published understood was referred to, is incompetent.

Cross references. See further on this question, annotations under McCaleb v. Smith (22 Iowa 242), ante. p. 26; Kinyan v. Palmer (18 Iowa 377), Vol. II, p. 651; Barton v. Holmes (16 Iowa 252), Vol. II, p. 432.

BORLAND v. WALRATH, 33 IOWA 130

1. Conveyances and Deeds—Acknowledgment, Effect—Evidence—Burden of Proof.—A certificate of acknowledgment to a deed or other conveyance is *prima facie* evidence of its due execution: And the burden of proof is on a party seeking to defeat his deed or other conveyance by reason of his not having signed, executed or acknowledged it, to make out a clear case in order to overcome the certificate of acknowledgment, thereto, of the officer, p. 133.

Reaffirmed and extended in Mixer v. Bennett, 70 Iowa 331, 332, 30 N. W. 588, holding further that the introduction in evidence of a mortgage with its certificate of acknowledgment attached, makes out a *prima facie* case of the execution of both the mortgage and the notes thereby secured when the notes are fully described in the mortgage.

Reaffirmed and extended in Bailey, Wood & Co. v. Landingham, 53 Iowa 723, 724, 6 N. W. 77; Swett v. Large, 122 Iowa 271, 97 N. W. 1105, holding further that a certificate of acknowledgment to a deed or other conveyance is entitled to great weight, and can be overcome only by clear and convincing proof to the contrary.

Cross reference. See further on this question, annotations under Morris v. Sargent (18 Iowa 90), Vol. II, p. 590.

2. Written Instruments—Evidence—Signature—Expert Testimony—Comparison of Handwriting, Weight of Such Evidence.—Evidence as to the genuineness of a signature to a written instrument or other writing, based upon a comparison of handwriting and of the opinion of experts drawn therefrom is admissible in evidence; but it is of the most unsatisfactory character and is the lowest order of evidence, and it ought never to overthrow positive and direct evidence of credible witnesses who testify from personal knowledge, p. 133.

Reaffirmed in Whitaker v. Parker, 42 Iowa 586, 587; Darr v. Darrow, 120 Iowa 34, 94 N. W. 246; Ayhart, Rec'r, v. Wilhelmy, 135 Iowa 292-294, 112 N. W. 783; Murphy v. Murphy, 146 Iowa 262, 263, 125 N. W. 193.

Reaffirmed, explained and extended in Hammond v. Wolf, 78 Iowa 234, 42 N. W. 780, holding that where practical the writings to be compared should be so produced that the parties in interest may inspect them; that the witnesses may have the best means attainable for making comparisons; that the witnesses may be more intelligently examined in regard to their opinion; that the jury may be the better able to scrutinize and weigh the evidence; and that they may themselves compare the writings; but that where a writing is lost or destroyed and the signature thereto denied, a witness who saw the writing and signature may compare it as remembered with other handwriting of the party who denies his signature, and thereupon testify that they are the same.

Cited with approval in Galer v. Galer, 108 Iowa 499, 79 N. W. 258, the Supreme Court declining to compare signatures and handwriting of a party of papers of record and thereupon pass upon the genuineness of a signature.

Distinguished in Ball v. Skinner, 134 Iowa 307, 308, 111 N. W. 1026, holding that the rule does not apply to expert scientific witnesses, or to their evidence or opinion based upon their scientific knowledge.

Unreported citation. 138 N. W. 558.

STATE v. WEIR, 33 IOWA 134, 11 AM. REP. 115

I. Constitutional Law—Legislative Power—Law Dependent on Vote of People—Intoxicating Liquors.—The General Assembly cannot pass a law which shall be dependent for its force and validity

upon the vote of the people. The people cannot make laws in their primary or individual capacity; but must do so by representatives.

So Chap. 82 Acts of 1870 (13th General Assembly) providing for making the sale of intoxicating liquors unlawful by vote of the county, is unconstitutional, pp. 135-137.

Reaffirmed in State v. Metcalf, 33 Iowa 610 (abstract); Cooley v. Davis, 34 Iowa 130.

Distinguished in Lytle v. May, 49 Iowa 229, the court holding that the General Assembly may pass a law absolute in form, but dependent for its application upon the adoption thereof by a vote of the people of a city—the court upholding the constitutionality of Chap. 143, Acts of 1876 (16th General Assembly) providing for Superior Courts in cities.

Distinguished in State v. Forkner, 94 Iowa 11, 12, (cited in dissenting opinion 24, 30) 28 L. R. A. 206, 62 N. W. 775, 779, 781, the court holding that where a law is a complete and perfect enactment after the approval of the Governor and publication, it is constitutional, although it may depend upon a vote or consent of the people for its operation in a particular territory: Hence, upholding the constitutionality of the "Mulct" intoxicating liquor law, Chap. 62, Acts of Twenty-fifth General Assembly requiring the consent of the people of a city for its operation, etc., and allowing them to revoke the consent under certain conditions.

Distinguished in Eckerson v. City of Des Moines, 137 Iowa 478, 115 N. W. 187, the court holding that the Legislature may require a city to accept provisions of an act, either by its council, or by vote of the people, before the law becomes operative.

Cross reference. See further on this question, annotations under Dalby v. Wolf & Palmer (14 Iowa 228), Vol. II, p. 231.

WEST v. MOODY, 33 IOWA 137

1. Justice's Courts—Pleadings in—Technical Rules and Nicety Not Required.—Technical exactness or nicety of pleading is not required in a justice's court, it being sufficient if the pleadings apprise the parties of the nature of the cause of action and defense. Great liberality in the matter of pleading and in the introduction of evidence thereunder is allowed in such court, pp. 138, 139.

Reaffirmed in Finch v. Cent. R. R. of Iowa, 42 Iowa 306.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

NATIONAL BANK OF MICHIGAN v. GREEN, 33 IOWA 140

1. Pleading—Several Counts in Answer, Sufficiency of Each.—Where an answer contains several counts, each count must—under Secs. 2882 and 2894 of the Code of 1860—be sufficient and good in itself, or it will be bad on demurrer, p. 144.

Reaffirmed, varied and qualified in Cruver v. Ch. M. & St. P. Ry. Co., 62 Iowa 462, 17 N. W. 662, holding that the rule is applicable, under Sec. 2646 of the Code of 1873, to a petition of several counts; but that an objection apparent upon the face of a pleading, which might have been raised by demurrer, will be waived by going to trial on the merits, and cannot be raised for the first time in an instruction.

Cited in Kendig v. Marble, 55 Iowa 388, 7 N. W. 631, (dissenting opinion), the majority court opinion turning on another point.

Unreported citation 77 N. W. 861.

2. Contracts—Negotiable Promissory Note—Indorsement of—Lex Loci Contractus.—An indorsement of a negotiable promissory note is a separate contract, and is governed by the law of the state where it is made, p. 146.

Reaffirmed and explained in Davis v. Miller, 88 Iowa 118, 55 N. W. 90, holding that the liability of the maker of a negotiable instrument is determined by the law of the place where it is to be performed, but the liability created by an indorsement is to be fixed and construed according to the law of the place where it was made.

Cross reference. See further on this question, annotations under Rule 3 of Huse v. Hamblin (29 Iowa 501), ante. p. 551.

3. Conflict of Laws—Common Law and Law Merchant—Contract—Lex Loci Contractus—Foreign Decisions—Binding Effect in Court of This State.—The decisions of a foreign state construing the Common Law or Law Merchant applicable to a contract made there, are not conclusive thereon upon the courts of this state, pp. 146, 147.

Reaffirmed and explained in Dorr Cattle Co. v. Des Moines Nat'l Bank, 127 Iowa 166, 167, 4 Am. & Eng. Ann. Cas., 519, 102 N. W. 837, holding that every court will determine for itself, the principles of justice as found in the Common Law, and will not be bound by the decisions of a sister state thereon.

4. Negotiable Note—Indorsement of—Rights of—Rights of Good Faith Indorsee against Indorser.—The indorsee in good faith of a negotiable promissory note can recover of the indorser the amount thereof without regard to the consideration paid for its transfer or indorsement, p. 147.

Reaffirmed and extended in Lay v. Wissman, 36 Iowa 307-309, holding further that in an action on a negotiable note or other such instrument equities existing between the maker and the payee cannot be set up against the indorsee in the ordinary course of business, for a valuable consideration, in good faith, and before maturity; and that such an indorsee may recover the face value of the note although he may have paid less therefor.

Cross references. See further in this connection, annotations under Lake v. Reed (29 Iowa 258), ante. p. 523; Gage v. Sharp (24 Iowa 15), ante. p. 140.

CONNELL v. STELSON, 33 IOWA 147

1. Change of Venue in Justice's Court—When Proceedings and Judgment upon Is Void.—Where a change of venue in a criminal case is granted by a justice to another justice and the latter refuses to act, whereupon the officer having accused in custody takes him before another justice, the proceedings before and judgment by the last are without jurisdiction and void, p. 149.

Reaffirmed and explained in Bremner v. Hallowell, 59 Iowa 434, 13 N. W. 412, holding that under Sec. 3534 of the Code of 1873, when a change of venue is granted by a justice of the peace, it is his duty to send the papers to the next nearest justice; and this of necessity requires the justice granting the change to designate by name who is the nearest justice; and that until this latter is done and the record shows such designation and determination, the change is not complete, and all proceedings before another justice are void, and will be set aside on writ of error.

Distinguished in Tennis v. Anderson, 55 Iowa 627, 8 N. W. 478, holding that where a case is sent on change of venue to the wrong justice, the error must be corrected as other errors committed by a justice of the peace, and cannot be set up in a collateral proceeding to defeat the judgment rendered upon such a change.

2. Void Judgment—Injunction.—Injunction lies to restrain the enforcement or collection of a void judgment, p. 149.

Reaffirmed in McConkie and Lower v. Landt, 126 Iowa 319, 320, 101 N. W. 1122.

Reaffirmed and explained in Iowa Union Telephone Co. v. Boylan, 86 Iowa 93, 94, 52 N. W. 1123, holding that where a judgment is rendered against a defendant who has had *no notice* of the action, it is void; and chancery will set it aside and enjoin process or proceeding thereunder upon complaint of the party aggrieved: And in an action therefor the plaintiff is not required to plead or prove that he is not indebted to the plaintiff in the first action.

Reaffirmed and explained in Leonard v. Capital Ins. Co., 101 Iowa 435, 70 N. W. 630, holding that a court of chancery has jurisdiction to set aside, cancel, and enjoin the enforcement of a void judgment; and that an appeal is not the only remedy of the party aggrieved in such case.

Reaffirmed and qualified in Hawkeye Ins. Co. v. Huston, 115 Iowa 624, 89 N. W. 30, holding that under Sec. 4364 of the Code of 1897, an action to set aside a void judgment and to enjoin proceedings on an execution thereunder, must be brought in the court rendering it.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations and note under Givens v. Campbell (20 Iowa 79), Vol. II, p. 778.

BLAKE v. McMILLEN, 33 IOWA 150

(Former appeal 22 Iowa 358.)

1. Bills and Notes—Negotiable Instruments—Presentment to Joint Makers—Liability of Indorsers.—The presentment for payment to only one of two joint makers of a negotiable note is not sufficient to charge an indorser thereof, unless a legal excuse for the failure to present to the other maker be shown, pp. 150, 151.

Reaffirmed and explained in Graul v. Strutzel, 53 Iowa 713, 36 Am. Rep. 250, 6 N. W. 119; Closz & Michelson v. Miracle, 103 Iowa 200, 72 N. W. 503, holding further that in order to charge indorsers, a promissory note must be presented for payment personally to all the makers thereof, at their place of residence or business, where such place or residence is known to the holder.

Reaffirmed and varied in Closz & Michelson v. Miracle, 103 Iowa 200, 72 N. W. 503, holding that mailing a letter demanding payment, to the maker of a promissory note, is not sufficient presentment for payment, to charge an indorser.

Reaffirmed and extended in Bank of Red Oak v. Orvis, 40 Iowa 332; Closz & Michelson v. Miracle, 103 Iowa 200, 72 N. W. 503, holding further that presentation to and demand of payment of one of two or more joint makers of a negotiable note is insufficient to charge an indorser.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

BAKER v. JOHNSON COUNTY, 33 IOWA 151

(Later appeals 37 Iowa 186; 43 Iowa 645.)

1. Counties—Municipal Corporations—Verbal Contracts by—Failure to Enter of Record—Effect.—A county, or other municipal corporation, may make a verbal contract as an individual may; and the failure of the county, or other municipal officials to enter such a contract of record in the books of the corporation does not affect its validity, pp. 153, 154.

Reaffirmed in Bellmeyer v. Indep. Dist. of Marshalltown, 44 Iowa 566, 567; Jordan & McCollum v. Osceola County, 59 Iowa 388, 389, 13 N. W. 345.

Cross reference. See further on this question, annotations under Athearn v. Indep. Sch. Dist. of Millersburg (33 Iowa 105), ante. p. 788.

2. Counties—Unliquidated Claims against—Limitation of Actions.—Under Sec. 2740 of the Code of 1860, the limitation begins to run against an unliquidated claim against a county from the time the claim accrues or is due, and not from the time presentment to the board of supervisors and demand of payment is made, pp. 154, 155.

Reaffirmed in Kinsey v. Louisa County, 37 Iowa 438, 439; Dist. Township of Spencer v. Dist. Township of Riverton, 62 Iowa 32, 17 N. W. 105.

Reaffirmed and varied in First Nat'l Bank of Garrettsville v. Greene, Adm'r, 64 Iowa 449, 17 N. W. 86; Lower v. Miller, sheriff, 66 Iowa 413, 414, 23 N. W. 899; Hintrager v. Traut, 69 Iowa 748, 27 N. W. 808; Great Western Telegraph Co. v. Purdy, 83 Iowa 433, 50 N. W. 46; State Ins. Co. v. Griffin, 84 Iowa 604, 51 N. W. 64; Grand Lodge A. O. U. W. v. Graham, 96 Iowa 614, 31 L. R. A. 133, 65 N. W. 842; Collman v. Eq. L. Assurance Society, 133 Iowa 179, 180, 8 L. R. A. (New Series) 1019, 110 N. W. 445, holding that a party holding a claim or right of action may not be allowed to prolong the operation of the statute by refusing to take the steps which the law requires in order to authorize the maintenance of an action.

Cited in Hintrager v. Hennessey, 46 Iowa 602, the court holding that under Sec. 790 of the Code of 1860, and Sec. 902 of the Code of 1873, a tax purchaser's right to maintain an action for the recovery of land purchased at a tax sale, is barred after the expiration of five years from the time he is entitled to demand and receive a tax deed thereto.

Cited in Prescott v. Gouser, 34 Iowa 179; Ball v. Keokuk & N. W. Ry. Co., 62 Iowa 753, 754, 16 N. W. 592, the court holding that where a right of action depends upon some act to be done by the plaintiff, he cannot, by failing to do such act, prevent the statute from running; and that where there are no special circumstances which excuse the party from making the demand, and the same is not made within the time prescribed in the statute, then it is not made within a reasonable time, the claim or right of action is thereby barred.

Cited with approval in Mickel v. Walraven, 92 Iowa 431, 60 N. W. 635, the case turning on other points closely connected herewith.

Distinguished in Reizenstein v. Marquardt, 75 Iowa 296, 297, 9 Am. St. Rep. 477. 1 L. R. A. 318, 39 N. W. 507, holding that the statute of limitation does not commence to run against an action by a bailor against his bailee for conversion of property which is the subject of the bailment, until the bailee denies the bailment and converts the property to his own use; but that refusal by the bailee to deliver it to the bailor on demand, is conversion.

Distinguished in Hintrager v. Richter, 76 Iowa 410, 41 N. W. 56, holding that where money is paid to a city auditor to be paid over to a tax sale purchaser of real estate, to redeem from the sale, the tax sale purchaser may sue the successor in office of such auditor and the sureties on his official bond therefor, when such successor receives the money from his predecessor and fails to pay it over; and this although more than three years (the period of limitation of actions against officers under Sec. 2529 of the Code of 1873) have elapsed since the payment to the predecessor.

BARDSLEY v. HINES, 33 IOWA 157

1. Actions—Original Notice—Service by Publication—What Record to Show—Strict Compliance with Statute—Void Decree.—The statute—Chap. 240, Acts of 1857—in relation to the service of original notice by publication must be strictly complied with and the decree entered thereon must recite facts showing full and strict compliance therewith, or it will be void, pp. 158, 159.

Reaffirmed and explained in Bradley v. Jamison, 46 Iowa 71; Royer v. Foster, 62 Iowa 324, 17 N. W. 517, holding, under the Code of 1851 and Chap. 240, Acts of 1857, that when the notice in an action is served by publication, the record must show that all the requirements of the statute were strictly complied with, or the court will have no jurisdiction, and a judgment rendered thereunder will be void.

Reaffirmed and explained in Schaller & Son v. Marker, 136 Iowa 576, 577. 114 N. W. 44, holding that the court acquires jurisdiction by publication only by strict compliance with the statutory requirements: And holding that a notice by publication in an attachment and garnishment action which named the defendant as "Chase Marker" instead of "Chan Marker" conferred no jurisdiction on the court to render judgment either against the defendant or the garnishee.

Cited in State v. Minn. & St. L. Ry. Co., 88 Iowa 696, 56 N. W. 403; State v. Waterman, 79 Iowa 365, 44 N. W. 678, involving the sufficiency of notice and recitals of record in proceedings to establish county roads and highways.

Cited in Slater v. Roche, 148 Iowa 417, not in point.

Distinguished and narrowed in Sweeley v. Van Steenburgh, 69 Iowa 699-701, 26 N. W. 79, holding that, under Sec. 2618 of the Code of 1873, a judgment rendered upon a notice by publication as allowed by such section, is valid, when the record shows that the notice was published in the manner and for the length of time prescribed by law, before the rendition of the judgment, if the defendant is *in fact* a non-resident, although proof of such non-residence be not shown by the record—But see Carnes v. Mitchell, 82 Iowa 606, 607, 48 N. W. 943, (reaffirming the text) distinguishing the above case, and holding that unless an affidavit be filed stating, as required by Sec. 2618 of the Code of 1873, that personal service cannot be made on the defendant within this state, that a decree rendered upon a service by publication, in an action involving a matter allowing service by publication under such section, is *void* for want of jurisdiction of the court.

Unreported citation 126 N. W. 926; 138 N. W. 560.

Cross reference. See further on this question, annotations under Abell v. Cross (17 Iowa 171), Vol. II, p. 511.

ELLSWORTH v. ELLSWORTH, 33 IOWA 164**1. Decedent's Estate—Descent and Distribution—Exemptions to Widow—Personalty No Longer Used by Her—Distribution.—**

Where personal property is in the hands of a widow which is set apart under Sec. 2361 of the Code of 1860 (personalty in her hands as head of the family which would be exempt from execution) for the benefit of herself and the family of decedent, and the widow is no longer the head of such family, and the property is not needed, or used for the benefit of the widow or family it is (under Sec. 2422 of the Code of 1860) subject to distribution according to law, but not to the payment of decedent's debts, p. 168.

Reaffirmed and extended in Adkinson v. Breeding, 56 Iowa 28, 8 N. W. 686, holding further that personal property allowed to a widow as head of the family under Sec. 2371 of the Code of 1873 belongs to her absolutely, and is not subject to her deceased husband's debts, although there be no inventory or appraisal thereof as provided by such section.

Cited in Linton v. Crosby, 56 Iowa 388, 41 Am. Rep. 107, 9 N. W. 312, the court holding that where for several years before his death, a husband and wife who have no children, live apart and he furnishes her no support during the period of separation, that he is not the head of a family, and, upon his death, the wife is not entitled to the exemption accorded a widow of a head of a family, under the statute.

Cited in Beatty v. Wardell, 130 Iowa 656, 114 Am. St. Rep. 457, 4 L. R. A. 544, 105 N. W. 359, not in point.

Cross reference. See further in this connection, Sec. 3312 of the Code of 1897.

MEEK v. BUNKER, 33 IOWA 169

1. Executions—Execution Issued after Death of Judgment Plaintiff—Failure to Make Statutory Indorsement—Effect—Injunction.—Where an execution is issued after the death of the judgment plaintiff, and it is not properly indorsed as provided by Secs. 3482-3486 of the Code of 1860, the writ and levy thereunder are void, and proceedings thereunder will be enjoined upon complaint of the execution defendant, p. 175.

Reaffirmed and varied in Dunham v. Bentley, 103 Iowa 139, 140, 72 N. W. 438, holding that where there is no indorsement on an execution issued after the death of the judgment plaintiff, as provided by Secs. 3131-3133 of the Code of 1873, the execution is void, and a garnishee will not be held bound thereunder.

SCHOFIELD & Co v. BLIND, 33 IOWA 175

1. Fraud—Burden of Proof—Presumption of Good Faith.—Fraud will not be imputed when the facts and circumstances claimed

to constitute it, are consistent with the honesty and purity of intention of the parties to the alleged fraudulent transaction. Fraud, if denied, must be proven, the burden of proof being on the party alleging it, p. 176.

Reaffirmed in Drummond v. Couse, 39 Iowa 443; Kellogg v. Aherin, 48 Iowa 301; Bixby v. Carskadden, 55 Iowa 535, 536, 8 N. W. 355; Sunberg v. Babcock, 66 Iowa 520, 24 N. W. 21; Ley v. Met. L. Ins. Co., 120 Iowa 208, 209, 94 N. W. 569, 570; Baker v. Mathew 137 Iowa 418, 419, 115 N. W. 19, all holding that when the facts and circumstances of an alleged fraudulent transaction are consistent with the honesty and purity of intention of the parties thereto and the fraud is denied, the party alleging it must make it appear by satisfactory evidence.

Cross reference. See further on this question, annotations under Lyman v. Cessford (15 Iowa 229), Vol. II, p. 330.

CARTER v. ABBOTT, 33 IOWA 180

1. Sales of Personal Property—Warranty, What Statement Amounts to.—Whether true or false, or whether made in good faith or with a knowledge of its falsity and therefore fraudulent, any distinct assertion or affirmation of quality made by the owner during a negotiation for the sale of a chattel, which it may be supposed was intended to cause the sale, and was operative in causing it, will be regarded either as implying or as constituting a warranty, p. 181.

Reaffirmed in Nat'l Horse Importing Co. v. Novak, 95 Iowa 600, 64 N. W. 617.

Reaffirmed and extended in Figge v. Hill, 61 Iowa 432, 16 N. W. 340, holding further that the question whether there has been a warranty or not depends upon the intention and understanding of the parties, as collected from their acts and expressions at the time of the sale; and when the contract is not wholly in writing, is one of the facts for the jury, under the direction of the court.

Cross references. See further on this question, annotations under Rule 2 of Callanan v. Brown & Co. (31 Iowa 333), ante. p. 680; McGrew v. Forsythe (31 Iowa 179), ante. p. 663, and cross references there found.

DENNISON v. SOPER, 33 IOWA 183

1. Principal and Surety—Attachment by Surety, When Not Allowed, etc.—A surety cannot protect himself by attachment of property of his principal, until the maturity of the debt and payment thereof by him. And the payment of the debt by the surety after the commencement of such an attachment action by him, will not entitle him to judgment therein, pp. 185, 186.

Distinguished and doubted in Gribben v. Clement, 141 Iowa 147-151, 119 N. W. 598, holding that a surety may maintain an action to

foreclose a mortgage given to him by his principal to indemnify from loss by reason of the suretyship, as soon as he (the surety) becomes liable to pay such liability, provided he pays it after commencement of the action and before judgment, and files a supplemental petition, upon proper terms imposed by the court, showing the fact of payment.

McCUMMONS v. CHICAGO & NORTHWESTERN RY. CO., 33 IOWA 187

1. Railroads—Negligence—Fires Caused by Engine—Action for Damages—Burden of Proof.—In an action for damages against a railroad company for damages for injury to or destruction of property caused by a fire set from sparks from an engine, the burden of proof is on the plaintiff to prove the negligence of the defendant; but this proof may be made from facts and circumstances which might not be sufficient in cases capable of clearer proof.

The mere fact of injury to or destruction of property by a fire set by sparks from an engine does not make a *prima facie* case of negligence on the part of the defendant, p. 188.

Reaffirmed in Glanz v. Ch. M. & St. P. Ry. Co., 119 Iowa 612-614, 93 N. W. 576, being an action for personal injuries caused by attempting to extinguish a fire set by sparks from an engine.

Cited in Case v. Ch. R. I. & P. Ry. Co., 64 Iowa 763, 21 N. W. 30, the court holding that where the defendant is charged with negligence in the use of a structure which has become defective, it is incumbent on the plaintiff to prove that the defect came to the knowledge of the defendant, or existed for such a length of time that knowledge should be presumed.

Cited in Duree v. C. M. & St. P. Ry. Co., 118 Iowa 642, 92 N. W. 890, the court holding that in an action against a railroad company for the loss of an eye caused from a spark or cinder emitted from an engine, the plaintiff must affirmatively show negligence of the defendant—and that Sec. 2056 of the Code of 1897, corresponding to Sec. 1289 of the Code of 1873, shifting the burden of proof of negligence, has no application in such case: And holding that the emission of particles of coal or sparks, not unusual in size or quantity, will not, alone, warrant the inference of negligence, either in the improper management of the engine, or its lack of equipment with appliances of approved efficiency.

Cross reference. See further on this question, annotations under Gandy v. Ch. & N. W. R. R. Co., (30 Iowa 420), ante. p. 614.

LOVE v. WELCH, 33 IOWA 192

1. Tax Sale of Land—On What Days May be Made—Recitals in Tax Deed Concerning—Sufficiency of—Presumption of Regularity of Tax Sale.—A tax deed which recites that the land was sold for the taxes on the first Monday in December is not void by reason

of the sale not being made at a time authorized by law, unless it is shown that the sale was made contrary to the provisions of Sec. 776 of the Code of 1860. Although Sec. 763 of the Code of 1860, provides that all sales of land for taxes shall be made on the first Monday in October, yet Sec. 770 thereof provides that under certain conditions such sales may be made on the first Monday of the next succeeding month in which they can be made; and when a tax deed shows on its face that it was made on the first Monday of a succeeding month, it will be presumed, unless the contrary be shown, that the sale was as provided and allowed by Sec. 776, above mentioned, pp. 193, 194.

Reaffirmed and explained in Easton v. Savery, 44 Iowa 659; Bullis v. Marsh, 56 Iowa 750, 2 N. W. 580, holding—as does the present case—that under Sec. 784 of the Code of 1860, a tax deed such as set out in the text, is, at least, *prima facie* evidence that all the requisites of the law as to the *time and manner* of sale, were complied with.

Cited in Lathrop v. Irwin, 96 Iowa 717, 65 N. W. 973, the court holding that where the owner of land seeks to set aside a sale and tax deed thereof and thereto, because the land was not assessed and valued of the year for which it was sold, he must prove that none of the officers charged with the duty of assessing and valuing (by both the Codes of 1860 and 1873) did their duty in reference thereto, or it will be presumed to have been assessed and valued by some one of them as required by law.

TEGLER & CO v. SHIPMAN, 33 IOWA 194, 11 AM. REP. 118

1. Pleading—Amendment—Discretion of Trial Court—Abuse—Reversal.—Under Sec. 2977 of the Code of 1860, the trial court has a large judicial discretion in the matter of allowing or refusing to allow an amendment to a pleading at any stage of the proceedings and in furtherance of justice; and his ruling on such a question will not be cause for reversal, except in case of an abuse of such discretion and resulting prejudice to the substantial rights of the party appealing and complaining, pp. 196, 197.

Reaffirmed and extended in Davis v. Ch. R. I. & P. Ry. Co., 83 Iowa 745 (abstract), 49 N. W. 78, holding further that pleadings may—under the Code of 1873—be amended to conform to the proof and in furtherance of justice, at any time, and even after verdict and judgment.

Cross reference. See further on this question, annotations under Pride v. Wormwood (27 Iowa 257), ante. p. 401.

2. Intoxicating Liquors—Contracts for Sale of—When Not Void—Taking Orders by Agent.—Where a traveling agent takes an order for the sale of intoxicating liquor, which order is to be sent to his company in a foreign state and there by them accepted or disap-

proved, the acceptance of the order by the company in the foreign state fixes the place of contract, and it is not void as in violation of Sec. 1571 of the Code of 1860.

But such a contract would be void under such section if the company knew, at the time of accepting the order, that the buyer intended to keep or sell the liquor in this state in violation of the statute, or the sale was made to enable the buyer to violate the intoxicating liquor laws of this state, pp. 197-200.

Reaffirmed in Second Nat'l Bk. of Louisville, Ky., v. Curren, 36 Iowa 557, 558; Adae & Co. v. Zangs, 41 Iowa 541, 542; Engs & Sons v. Priest, 65 Iowa 233, 234, 21 N. W. 581; State v. Colby, 92 Iowa 466, 61 N. W. 188; Gross v. Feehan, 110 Iowa 168, 81 N. W. 236; Sachs & Sons v. Garner, 111 Iowa 425, 82 N. W. 1008.

Reaffirmed and explained in Wind v. Iler & Co., 93 Iowa 321, 322, 27 L. R. A. 219, 61 N. W. 1002, holding that knowledge on the part of the foreign seller of intoxicating liquors that the intoxicating liquors were to be sold in violation of law here, or that the buyer (resident of this state) had no legal right to sell, is a fact from which the jury, in an action for the purchase price, may infer that they were sold with the intention that the buyer violate the laws of this state, and thus render the contract invalid.

Reaffirmed, explained and qualified in Brown & Sons v. Wieland, 116 Iowa 714, 61 L. R. A. 417, 89 N. W. 18, holding that where a foreign seller of intoxicating liquors ships them to a place in this state, and takes the bill of lading in his own name, which he sends to a bank of the latter place, with directions to deliver to the buyer, who has no authority under the law to sell them, upon his making a certain payment and executing certain notes, all of which is done, the contract is made in this state, is in violation of law, and is invalid.

Reaffirmed and varied in Taylor & Co. v. Pickett, 52 Iowa 469, 470, 3 N. W. 516, holding that the rule applies where orders for intoxicating liquors are accepted and shipped from a place in this state wherein the shipper or seller has a permit to sell, under Secs. 1526 and 1531 of the Code of 1873, to another place or county in this state, under an order taken by an agent in the latter.

Distinguished in State v. Kriechbaum, 81 Iowa 636, 637, holding that where an agent takes an order for the delivery of intoxicating liquors in a certain county, to be approved in and the liquors shipped from another county of this state by his employer, and the sale in either under the facts is unlawful, he may be convicted for unlawfully selling intoxicating liquors upon information before a justice of the peace of either county (under Sec. 4159 of the Code of 1873).

Distinguished and explained in Gipps Brew. Co. v. De France, 91 Iowa 111-114, 51 Am. St. Rep. 329, 28 L. R. A. 386, 58 N. W. 1089, holding that where a foreign brewing company offers to sell beer for a stated time to a resident of this state, the purchaser to return the

kegs or pay a certain price therefor and such offer is accepted in this State, it is a contract made in and governed by the laws of this State, and entirely void, and an action cannot be maintained thereon: Money paid thereunder may be recovered from the brewing company.

ROWLEY & CO. v. BAUGH, MAYOR, 33 IOWA 201

1. Courts—Want of Jurisdiction—Mayor's Court—Indefinite Continuance of Action—Void Judgment—Certiorari.—Where a court has no jurisdiction of the person of the defendant, a judgment rendered in the action is void and will be annulled upon a writ of *Certiorari*.

So where by consent of parties, an action in a mayor's court is continued "until after the next ensuing term of the district court of the county" wherein the mayor's court is held, a judgment by default rendered subsequently to such term of the district court without notice to the defendant to appear and defend on a fixed day, is without jurisdiction, void, and will be annulled on *Certiorari*: and this without the defendant showing a defense on the merits, pp. 202, 203.

Reaffirmed and varied in Schieler v. Thede, 126 Iowa 399-402, 102 N. W. 134, holding that where a justice of the peace enters an order transferring an action to the district court he cannot thereafter set it aside and render judgment against the defendant without due notice to him; and that such a judgment will be enjoined upon complaint of the defendant without his showing a defense on the merits.

Reaffirmed and varied in Simmons v. Dolan, 141 Iowa 179, 119 N. W. 691, holding that where an action in justice's court is indefinitely postponed without the consent of the parties, a judgment subsequently rendered against the defendant without due notice to him, is void, and will be set aside in an action therefor in equity.

Cited in Spear v. Fitchpatrick, 37 Iowa 128, not in point, but upon analogy.

Distinguished in City of Cedar Rapids v. Rall, 115 Iowa 337, 88 N. W. 827, holding that where the parties to an action in a justice's court agree that it be continued to a date thereafter to be fixed, a judgment is valid that is rendered on the date thereafter fixed, of which date the defendant had due notice.

HOUGHAM v. HARVEY, 33 IOWA 203

1. Highway—Dedication—Evidence to Establish.—Long and continuous use of a highway by the public, and the fact that work was done on it, all with the knowledge and consent of the owner of the land, is sufficient evidence of its dedication therefor, p. 204.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under *Onstott v. Murray* (22 Iowa 457), ante, p. 56.

2. Highway—Obstruction of a Nuisance—Injunction to Abate—Who May Maintain Action.—The obstruction of a public highway is, under the Code of 1860, a nuisance; and injunction lies for abatement thereof upon complaint in equity of any person specially injured thereby; and such plaintiff may therein recover damages specially caused to him, p. 205.

Reaffirmed in Myers v. Priest, 145 Iowa 84, 123 N. W. 944.

Reaffirmed and explained in Ingram, Kennedy & Day v. C. D. & M. R. R. Co., 38 Iowa 675, holding that an unlawful obstruction of a public highway is a public nuisance, not generally actionable by and a private person has a right of action, only, when he suffers an injury distinct from the public, as a consequence of the wrongful act.

Reaffirmed and explained in Musser v. Hershey, 42 Iowa 364, 365, holding that one who will sustain special damage different in kind and degree to that which will be sustained by the public, may enjoin the erection of a public nuisance.

Reaffirmed and explained in Innis v. Cedar Rapids, I. F. & N. W. Ry. Co., 76 Iowa 167, 168, 2 L. R. A. 282, 40 N. W. 702, holding that a private individual will not be allowed to maintain an action to restrain or abate a public nuisance, unless he can show that it occasioned some peculiar damage or injury to him.

Reaffirmed and varied in Brandt v. Plumer, 64 Iowa 35, 19 N. W. 843, holding that in an action by a private individual to recover damages by reason of the unlawful obstruction of a highway, the plaintiff must aver and prove that he has sustained some special damages or injury not shared by the public generally.

Cross reference. See further on this question, annotations under Rule 2 of Ewell v. Greenwood (26 Iowa 377), ante. p. 342.

OGDEN v. FORNEY, 33 IOWA 205

1. Written Instruments—Failure to Affix United States Revenue Stamp to—Effect—When Instrument Invalid or Inadmissible in Evidence.—The failure to affix a United States Revenue Stamp to a written instrument as required by the Act of Congress of 1864, does not render it invalid, or inadmissible in evidence, unless the stamp was omitted for the purpose of evading such law, p. 206.

Special cross reference. For cases citing the text and others on the question, see annotations under Rule 2 of Mitchell v. Home Ins. Co. (32 Iowa 421), ante. p. 760.

HANLIN v. PARSONS, 33 IOWA 207

1. Chattel Mortgage—Usury—Injunction from Foreclosure Sale on Notice—Judgment of Forfeiture in Favor of School Fund.—Where an injunction issues to restrain a foreclosure sale on notice of a chattel mortgage—as allowed by Sec. 3659 of the Code of 1860—

because of usury in the contract, the case stands in the district court as an action for foreclosure; and the court should proceed to determine the question of usury and if it be found to exist enter judgment in favor of the school fund as allowed by the usury statute (Code of 1860), and otherwise proceed as in an action of foreclosure where usury is pleaded, pp. 209, 210.

Distinguished in Sweet, Dempster & Co. v. Oliver, 56 Iowa 746, 10 N. W. 276, holding that injunction will not lie to restrain a sale of foreclosure of a chattel mortgage on notice under Sec. 3317 of the Code of 1873 corresponding to the Sec. of the rule and upon complaint of an attachment creditor of the mortgagor, unless insolvency of the mortgagee in possession of and proceeding to sell the personalty is averred and proven; as without this the attachment creditor has a complete remedy at law by garnishment.

VICTOR v. HARTFORD FIRE INSURANCE CO., 33 IOWA 210

1. Attachment—Garnishment—Rights and Liabilities of Garnishee—Nature and Effect of Garnishment.—The effect of garnishment—under Sec. 3209 of the Code of 1860—is to stop the payment of any debt owing at the time of the service of the writ, or which may be subsequently owing by the garnishee to the defendant (debtor).

In order to fix the liability of a garnishee the relation of debtor and creditor, a pecuniary liability, must exist between him and the defendant (debtor), p. 214.

Reaffirmed and explained in Metcalf v. Kincaid, 87 Iowa 446, 43 Am. St. Rep. 391, 54 N. W. 868, holding that the garnishee can not, because of his garnishment, be placed in any more favorable or unfavorable position than he would be if the defendant (debtor) were seeking to enforce his claim.

Reaffirmed and explained in Peters v. Snavelly-Ashton, 144 Iowa 159, 160, 120 N. W. 1053, holding that in order for a garnishee to be liable the demand of the debtor of the attaching plaintiff must be of such a nature that such debtor could have maintained an action of debt in his own right for the recovery of the demand sought to be subjected.

Cross references. See further on this question, annotations under Smith et al, v. Clark & Henley (9 Iowa 241), Vol. I, p. 571. See also in this connection, annotations under Morse v. Marshall (22 Iowa 290), ante. p. 34.

2. Fire Insurance Companies—Forfeiture by Company for Breach of Conditions by Insured—Unearned Premium—Rights of Insured and His Creditors in Relation to.—Where a fire insurance company has forfeited and declared void a policy of insurance by reason of a violation by insured of a condition therein, that "if any change takes place in the title or possession of the property, whether

by sale, legal process, judicial decree, voluntary transfer or conveyance * * * then and in every such case this policy shall be void," the insured cannot maintain an action for the unearned premium nor can his creditor garnish the company therefor: And this although the policy may contain an additional provision that "this policy may be canceled at any time at request of assured, the company retaining customary monthly short rates for time policy has been in force; it may also be canceled at any time by the company, on giving written or verbal notice to that effect, and refunding or tendering ratable proportion of the premium for the unexpired term of the policy," pp. 215, 216.

Reaffirmed and varied in *Economic Life Ass'n v. Spinney*, 116 Iowa 387, 89 N. W. 1096, holding that the fact that a policy of insurance (in this case life insurance) has lapsed or has been forfeited for failure of insured to comply with conditions, is no defense, either complete or *pro tanto*, to an action on notes given for the premium.

FOSTER v. ELLIOTT, 33 IOWA 216

1. **Pleadings—Construction of.**—Under Sec. 2951 of the Code of 1860, in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties, p. 223.

Reaffirmed in *Lampman v. Buning*, 120 Iowa 170, 94 N. W. 563, holding that the rule is the same under the Code of 1897, although the section of the text is omitted therefrom.

2. **Torts—Damages—Nominal Damages.**—When a right is invaded or a wrong done, and no particular damage is proved, the law implies or infers nominal damages, p. 223.

Reaffirmed and explained in *Harvey v. Mason City & Ft. Dodge R. R. Co.*, 129 Iowa 482, 483, 113 Am. St. Rep. 483, 3 L. R. A. (New Series) 973, 105 N. W. 964, holding, however, that the failure to allow the recovery of nominal damages *only*, in an action for a tort or for negligence, is not cause for reversal upon appeal to the Supreme Court, unless the awarding of such damages would settle or adjudicate a right or interest to or in the thing involved.

MILLER v. HOLLINGSWORTH, 33 IOWA 224

1. **Husband and Wife—Principal and Agent—Husband May Contract as Agent for Wife—Ratification by Wife—Mechanic or Materialman's Lien on Land of Wife under Husband's Contract.**—A husband may contract in relation to his wife's property and as her agent; but in order to bind her thereby it must be shown that the husband acted as agent under previously conferred authority, or, that she subsequently ratified his acts, with knowledge thereof, either express or implied; and the ratification must be shown by those unmis-

takable acts or declarations which evince a knowledge of the contract by which she is sought to be bound, and an intention to adopt or ratify it as her own, pp. 227, 228.

Reaffirmed in Bissell v. Lewis, 56 Iowa 235, 236, 9 N. W. 179.

Reaffirmed and explained in Price & Hornby v. Seydel, 46 Iowa 697, 698, holding—as does the present case—that the fact of a husband's agency cannot be inferred from the marital relation, but that some previous appointment, or general holding out to the public as agent, or subsequent adoption or ratification of his acts is essential in order to hold the wife bound thereby.

Reaffirmed and qualified in Miller v. Hollingsworth, 36 Iowa 165, 166, holding that equity will enforce a lien on real estate of a wife for the amount of lumber and other materials purchased by her husband and used in the improvement of such realty, with the full knowledge and acquiescence of the wife, when it is further shown in the action that the materials and lumber were not furnished on the credit of the husband alone.

Distinguished and narrowed in Furman v. Ch. R. I. & P. Ry. Co., 62 Iowa 398, 399, 17 N. W. 599, holding that in an action against a common carrier for failure to deliver household goods which were jointly used by both husband and wife, and where the husband took the bill of lading in his own name, the agency of the husband so to do may be inferred from slighter circumstances than would be necessary to establish an agency on the part of a stranger.

Cross reference. See further on this question, annotations under Rule 4 of McLaren v. Hall (26 Iowa 297), ante. p. 327.

PIERCE v. PIERCE, 33 IOWA 238

1. Divorce and Alimony—Abandonment by Wife as Ground for Divorce by Husband—What Sufficient “Reasonable Cause.”—The “reasonable cause” which will justify a wife in abandoning her husband and which will defeat an action for divorce on his part, must be such cause as will constitute a ground of divorce in an action therefor by her, pp. 240, 241.

Reaffirmed in Taylor v. Taylor, 80 Iowa 30, 20 Am. St. Rep. 394, 45 N. W. 307.

Reaffirmed and varied in Russell v. Russell, 150 Iowa 140, 129 N. W. 836, holding that the cause which will justify a husband in deserting his wife must be such as would *prima facie* entitle him to a divorce; and that when he abandons her without such cause, he can be compelled by her to pay maintenance for the support of herself and minor children from the time of the abandonment until the expiration of the two years which entitles her to sue for divorce and permanent alimony.

2. Res Adjudicata—Effect of Former Judgment on Defenses Which Could Have Been Pleaded in First Action.—A judgment on the merits in an action bars a subsequent action on any matter which might have been, but was not set up as a defense to the first action, in the absence of proof of fraud, deceit or artifice on the part of the plaintiff in the first action, or of mistake or misfortune on the part of defendant which prevented his setting up the defense in the first action, p. 245.

Reaffirmed in Smith, Cleary & Enright v. Leddy, 50 Iowa 115; Tredway v. McDonald, 51 Iowa 667, 2 N. W. 570; Mally v. Mally, 52 Iowa 659, 3 N. W. 674; Ebersole v. Lattimer & Inglis, 65 Iowa 165, 166, 21 N. W. 501; Bedwell v. Gephart, 67 Iowa 49, 24 N. W. 587; Foster v. Hinson, 76 Iowa 720, 39 N. W. 685; Simmons v. Dolan, 141 Iowa 182, 119 N. W. 692.

Reaffirmed and explained in Stodghill v. C. B. & Q. R. R. Co., 53 Iowa 345, 346, 5 N. W. 498, holding that an adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with the subject-matter of litigation.

Reaffirmed and explained in Hogler v. Smith, 136 Iowa 36-39, 113 N. W. 558, holding further that *res adjudicata* applies to defenses set up in an action which are not withdrawn, although the judgment recites that no evidence was introduced as to them and that they were not decided upon.

Cross references. See further on this question, annotations under Schmidt v. Zahensdorf (30 Iowa 498), ante, p. 630; Rule 2 of Hackworth, Gdn., v. Zollars (30 Iowa 433), ante, p. 618; Rule 2 of Doyle v. Reilly (18 Iowa 108), Vol. II, p. 593.

JONES, KITCH & Co. v. TURCK & Co., 33 IOWA 246

1. Principal and Agent—Liability of Principal for Acts of Agent.—A principal is only liable for the acts of an agent, done in pursuance of and within the scope of his authority, p. 249.

Reaffirmed in Young v. Inman & Nelson, 146 Iowa 497, 125 N. W. 179.

MATHER v. BUTLER COUNTY, 33 IOWA 250

(Former Appeals; 16 Iowa 59; 28 Iowa 253.)

1. New Trial—Newly Discovered Evidence as Ground for—Must be Material and Competent.—A new trial will not be granted for newly discovered evidence, unless it is both material and competent, p. 252.

Reaffirmed in Town v. Manson v. Ware, 63 Iowa 350, 19 N. W. 277.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

Cross reference. See Rule 2 hereof. See further on this question, annotations under *Alger v. Merritt* (16 Iowa 121), Vol. II, p. 415.

2. New Trial—Newly Discovered Evidence—Party Applying for to Show Diligence.—A new trial will not be granted on the ground of newly discovered evidence, unless the party asking it shall show to the court that he was diligent in his efforts to obtain the evidence prior to the trial, p. 253.

Reaffirmed in *Hambel v. Williams*, 37 Iowa 228, 229.

Cross references. See further on this question, annotations under *Alger v. Merritt* (16 Iowa 121), Vol. II, p. 415; *Lisher v. Pratt* (9 Iowa 59), Vol. I, p. 544.

PORTER v. LAFFERTY, 33 IOWA 254

1. Mortgages on Land—Duty of Mortgagor or Purchaser from to Pay Taxes—Purchase by at Tax Sale.—It is the duty of a mortgagor of land, where the mortgage contains covenants of warranty, to pay the taxes on the land existing at the time of the execution of the instrument; and a purchaser of the land from the mortgagor, with knowledge of the mortgage, and who agrees to discharge it as part of the consideration for the purchase, succeeds to the same liabilities in reference to such taxes as his grantor (mortgagor).

If either the mortgagor or such a purchaser becomes purchaser at a tax sale of the land for such taxes, he holds the tax title in trust for the mortgagee, p. 260.

Reaffirmed in *Bowen v. Kurtz*, 37 Iowa 241; *Dayton v. Rice*, 47 Iowa 431.

Reaffirmed and extended in *Stears v. Hollenbeck*, 38 Iowa 551, holding further that one who purchases land from a mortgagor and accepts a warranty deed therefor which excepts from the warranty a certain mortgage on the land *and all back taxes*, cannot buy the land at a sale for such taxes and hold the tax title adverse to the rights of the mortgagee in the mortgage.

Reaffirmed and extended in *Fair v. Brown*, 40 Iowa 210, 211, holding further that a mortgagor, or one claiming title under him, cannot defeat the lien of the mortgagee by acquiring a tax title upon the land: And holding further that one incumbrancer of land cannot defeat the lien of another by a purchase thereof at a tax sale; but such purchase inures to the benefit of both.

Reaffirmed and extended in *Manning v. Bonard*, 87 Iowa 652, 54 N. W. 459, holding further that one holder of a lien on or interest in land cannot purchase at or redeem from a tax sale, or take an assignment of the tax title thereto, and deprive other lienholders or persons

having an interest therein of their rights; but such transaction inures to the benefit of all of the parties interested.

Reaffirmed and extended in Nat'l Surety Co. v. Walker, 148 Iowa 162, 163, 125 N. W. 351, holding further that one in possession of real estate or whose duty it is to pay the taxes cannot acquire by tax deed a title which will defeat a conflicting claimant or lienholder; and this applies to any person having such an interest in land as would entitle him to redeem from tax sale.

Reaffirmed and extended in Busch v. Hall, 119 Iowa 288, 93 N. W. 359, holding further that when a tax deed to land is obtained by a transaction which amounts to the payment of the taxes by one under obligation to pay them, the deed is void, and the tax title inures to the benefit of the mortgagee of the land.

Distinguished in Curtis v. Smith, 42 Iowa 671, holding that one in possession of land, but having no interest therein, and who is under no obligation to pay taxes thereon and not holding as tenant, trustee, or agent of or for the owner, may become a purchaser at a tax sale thereof: And that this rule applies to the grantee of such land under a quitclaim deed which conveys no interest therein, and who holds possession hostile to the land owner.

Distinguished in Ritchie v. McDuffie, 62 Iowa 47, 48, 17 N. W. 167, 168, holding that the rule does not apply to one who purchases the land from a purchaser who assumes a mortgage thereon, when the last purchaser does not agree to pay the mortgage.

Cross references. See further on this question, annotations under Rule 1 of Rice v. Nelson (27 Iowa 148), ante. p. 379; Hunt v. Rowland (22 Iowa 53), ante. p. 6.

MANNY & CO. v. WOODS, 33 IOWA 265

1. Chattel Mortgage—Mortgagee Is a Purchaser in Meaning of Recording Act.—A mortgagee of a chattel mortgage is a *purchaser* within the meaning of the recording laws of this state, and of Sec. 2201 of the Code of 1860, p. 269.

Reaffirmed in Iowa Loan Co. v. Kimball Piano Co., 124 Iowa 151, 99 N. W. 576; Central Trust Co. v. Stepanek, 138 Iowa 135, 15 L. R. A. (New Series) 1025, 115 N. W. 893, under Sec. 2906 of the Code of 1897.

STATE v. MORPHY, 33 IOWA 270, 11 AM. REP. 122

1. Evidence—Opinions of Medical Experts.—Testimony of medical men as to the instruments producing, and the nature of wounds, the cause of a disease or the consequences of wounds, is always admissible in a case involving such questions, (in this case upon the trial of an indictment for murder), p. 272.

Reaffirmed in State v. Seymour, 94 Iowa 705, 63 N. W. 663.

Reaffirmed and explained in State v. Porter, 34 Iowa 134, holding that the opinions of medical men, who are shown to be experts, as to the instruments producing, and the nature and consequence of wounds, or the causes of diseases, are competent evidence in a prosecution for homicide.

Reaffirmed and explained in Sachra v. Town of Manilla, 120 Iowa 567, 568, 95 N. W. 200, holding that what *in fact* causes a wound or injury is a question for the jury, but what *might or might not* have caused it is a matter of expert testimony.

Unreported citation, 135 N. W. 1102.

2. New Trial—Juror Drinking Intoxicating Liquor—When Not Ground for New Trial.—The drinking of intoxicating liquors by a juror or jurors during the progress of or adjournment of a cause, and *before final submission* for deliberation and verdict, is not a ground for a new trial, unless it be shown that such drinking so affected the juror's or jurors' brain or brains that he or they were thereby incapable of calm and dispassionate reasoning, or that the party complaining was otherwise prejudiced thereby, p. 273.

Reaffirmed and explained in Gorham v. Sioux City Stock Yards, 118 Iowa 751, 92 N. W. 698, holding that the admission of a juror in an affidavit in support of a new trial that he took a dose of quinine and whiskey for a severe cold will not, of itself, justify setting aside the verdict.

Reaffirmed and qualified in Hopkins v. Knapp & Spalding Co., 92 Iowa 214, 60 N. W. 620, holding that the use of intoxicating liquors by a juror while the jury is deliberating, unless it is used as a medicine and in case of actual sickness, is a ground for a new trial: That where a juror, while the jury is deliberating, uses intoxicating liquors, adopting a plea of sickness as a subterfuge, the verdict will be set aside.

Cross references. See further on this question, annotations and cross references under Ryan v. Harrow (27 Iowa 494), ante. p. 427.

3. Murder—Second Degree—Intent to Kill Not an Element of.—A specific intention to kill is not necessary under the Common Law to constitute murder; and under our statute—Code of 1860—such intention is not necessary to constitute murder in the second degree, although essential to murder in the first degree, pp. 275, 276.

Reaffirmed in State v. Mewhirter, 46 Iowa 102; State v. Dillon, 74 Iowa 656, 38 N. W. 527; State v. Seery, 129 Iowa 266, 105 N. W. 514.

Reaffirmed and explained in State v. Baldes, 133 Iowa 163, 164, 110 N. W. 442, holding that an unlawful killing with malice, express or implied, is murder in the second degree even though unaccompanied by deliberation, premeditation, or specific intent to kill: That if the killing be shown not only to have been done in malice, but with deliber-

ation, premeditation, and a specific intent to kill, then, under our statute, it is murdered in the first degree.

Unreported citation, 129 N. W. 802.

Cross reference. See further on this question, annotations under Rule 2 of State v. Decklotts (19 Iowa 447), Vol. II, p. 748.

4. Murder—Wound Not Sole Cause of Death Does Not Constitute Defense—Burden of Proof.—If death ensues from a wound given in malice, not in its nature mortal, but which, by being neglected or mismanaged, the party dies, this will not excuse the prisoner who gave it; but he will be held guilty of the murder unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death, pp. 276, 277.

Reaffirmed in State v. Edgerton, 100 Iowa 70, 71, 69 N. W. 283; State v. Luther, 150 Iowa 160, 161.

Reaffirmed and explained in State v. Smith, 73 Iowa 40, 41, 34 N. W. 601, holding that if one, with malice aforethought, either express or implied, inflict an injury upon or to the person of another, which causes death, and which death would not then have occurred but for such injury so inflicted, the person inflicting such injury is guilty of murder in the second degree; and in such case it is no defense if another cause or other causes may also have contributed to such death.

(Note.—There are other cases sustaining but not citing the text.—Ed.)

5. Murder—Trial of Indictment for—Burden of Proof.—Upon the trial of an indictment for murder, it is a general rule that the State has the burden of proof, to show, beyond a reasonable doubt, the guilt of the accused; hence, any negative matter, such as the absence of self defense, the want of sufficient provocation, etc., must be shown by the State, and the defendant cannot be held to have the burden of proof cast upon him to show such matters.

But, in such case, whenever the matter of defense is wholly disconnected from the body of the offense charged, is distinct affirmative matter, the general rule, as above stated, does not properly apply; but in such cases the burden of proof rests upon the accused, p. 278.

Reaffirmed and explained as to first paragraph in State v. Porter, 34 Iowa 139, 140; State v. Fowler, 52 Iowa 106, 2 N. W. 983; State v. Cross, 68 Iowa 197, 26 N. W. 70; State v. Shea, 104 Iowa 726, 74 N. W. 687 holding that it is incumbent upon the State to prove every material fact necessary to constitute the guilt of accused beyond a reasonable doubt, failing which the accused is entitled to an acquittal.

Cross reference. See further on this question, annotations and cross reference under Rules 2-4 of State v. Felter (32 Iowa 49), ante, p. 713.

WILLIAMS v. ALLISON, 33 IOWA 278

1. Wills—Construction of—Absolute Devise or Bequest with Subsequent Directory Language—Effect.—Where a will devises and bequeaths all the testator's property to a named person absolutely, and then directs what disposition is to be made of property undisposed of at the time of the death of the devisee or legatee, the will gives him (the first devisee) a fee simple title to the property, and the directory language will be treated as repugnant and will be disregarded, p. 283.

Reaffirmed in Alden et al, v. Johnson et al, 63 Iowa 126, 127, 18 N. W. 697.

Reaffirmed and explained in Halliday v. Stickler, 78 Iowa 390, 43 N. W. 229, holding that if the first devisee has power by the terms of the will to dispose of the property, he must be considered the absolute owner, and any limitation over is void for repugnance.

Reaffirmed and explained in Bills v. Bills, 80 Iowa 271, 272, 20 Am. St. Rep. 418, 8 L. R. A. 696, 45 N. W. 748, holding that where there is an absolute or unlimited devise or bequest of property, a subsequent clause expressing a wish, desire or direction for its disposition, after the death of the devisee or legatee, will not defeat the devise or bequest, nor limit the estate or interest in the property to the right to possess and use during the life of the devisee or legatee; but the directory or limiting language will be disregarded, and the instrument be held to pass a fee simple title to the latter.

Reaffirmed and qualified in Stivers v. Gardner, 88 Iowa 311, 55 N. W. 518, holding that the whole of a will is to be construed together in order to arrive at the intention of the testator, and when it is clear therefrom that a devise is not intended to be absolute, it will not be construed to pass a fee simple title.

Reaffirmed and narrowed in In re Estate of Proctor, 95 Iowa 173-175, 63 N. W. 671, holding that when a will devises property to a certain person with power of disposing thereof for certain purposes only, and then provides as to the disposition of the property remaining upon the death of the devisee, the instrument does not pass a fee simple title to the latter, but only the right to use and enjoy the property and to dispose of it for the purpose named, with remainder over to the second or contingent devisee of the part not so disposed of upon the death of the first named devisee.

Cited in Iimas v. Neidt, 101 Iowa 357, 70 N. W. 206 (dissenting opinion); Podaril v. Clark, 118 Iowa 272, 91 N. W. 1094 (dissenting opinion); Meyer v. Weiler, 121 Iowa 71, 95 N. W. 261 (dissenting opinion), the majority court opinions deciding that certain provisions in wills did not pass fee simple titles.

2. Limitation of Actions—Action to Set Aside a Sheriff's Deed to Land.—An action to set aside a sheriff's deed to land which was sold in gross is barred—under Sec. 2740 of the Code of 1860—unless

commenced within ten years after the cause of action accrued; and this is the rule although fraud be averred as a ground to set aside the deed, pp. 284, 285.

Reaffirmed in Empire Real Estate and Mortgage Co. v. Beechley, 137 Iowa 11, 114 N. W. 557.

Cited in Willard v. Wright, 81 Iowa 719 (dissenting opinion), 45 N. W. 887, the majority court holding that an action to set aside the probate of a will is barred—under the Code of 1873—unless commenced within five years, although the setting aside thereof may incidentally involve the recovery of or title to real estate.

3. Execution or Judicial Sale of Land—Action to Set Aside—City Lots Sold in Gross—Laches—Innocent Purchaser.—Where one whose land is sold under an execution or judicial sale is guilty of laches in bringing an action to set it aside, equity will not afford him relief where the property has passed into the hands of an innocent third person or *bona fide* purchaser.

This rule applies where several city lots are sold in gross under an execution, pp. 288-290.

Reaffirmed and varied in Hansen's Empire Fur Factory v. Teabout, 104 Iowa 372, 73 N. W. 878, holding that creditors of a judgment debtor cannot sue to set aside an execution sale of several tracts of land, more than ten years after the sale, on the ground that the tracts were sold *en masse*, unless they plead and prove an excuse for not having sooner brought the action.

Distinguished in Conn. Mut. Life Ins. Co. v. Brown, 81 Iowa 44, 46 N. W. 750, holding that upon an execution sale of a divisible tract, or several tracts of land, if the entire tract, or the different tracts, for any reason, are more valuable when taken together, and will in that way sell for a larger sum, they may be so sold, and the sale will be subject to no objection to the land owner: That the fact that no bids were made when the land was offered in separate tracts, and it was, therefore, sold *en masse* raises a presumption that the land is more valuable when taken together, or, at least, that the defendant in execution suffered no prejudice by the sale.

4. Statute of Limitations—Application at law and in Equity.—Our Statute of Limitations applies equally to suits in equity and to actions at law, p. 285.

Reaffirmed in S. C. & St. P. Ry. Co. v. O'Brien County, 118 Iowa 583, 92 N. W. 858.

GREENE & Co. v. THOMPSON, 33 IOWA 293

1. Promissory Note—Guarantor of—Delay of Holder to Make Demand on Maker and Give Notice to Guarantor—When Discharges Latter.—Delay in the holder of a promissory note to make demand of payment of the maker and to give notice of his refusal to pay

to a guarantor thereof, will not discharge the latter from liability unless he was injured by the delay, pp. 294, 295.

Reaffirmed in Second Nat'l Bk. of Rockford v. Gaylord, 34 Iowa 248.

CORBIN v. WOODBINE, 33 IOWA 297

1. Appeal—Equitable Action Tried Below by Second Method—Review.—Upon an appeal in an equitable action tried below according to the second method prescribed by Secs. 2999 and 3000 of the Code of 1860, the Supreme Court will review the cause as appeals in actions at law; and in such cases the decision of the lower court upon the evidence will be treated upon appeal as the verdict of a jury, pp. 299, 300.

Reaffirmed in Dove v. Indep. Sch. Dist. of Keokuk, 41 Iowa 692; Sherwood v. Sherwood, 44 Iowa 196.

2. Tax Sale of Land—Action to Set Aside—Tender by Plaintiff—Decree.—Where in an action to set aside a tax sale of land the plaintiff makes the distinct statement and tender that he is ready and willing to pay the amount paid for the realty at the sale, together with all subsequent taxes, interest, costs, etc., and asks that such amounts be ascertained, it is error to render a decree setting aside the sale without requiring the plaintiff to pay such amounts, p. 301.

Reaffirmed in Farwell v. Des Moines Brick Mfg. Co., 97 Iowa 301, 302, 35 L. R. A. 63, 66 N. W. 181.

GOWER v. WINCHESTER, 33 IOWA 303

1. Mortgages on Land—Redemption by Junior Mortgagee from Sale under Senior's Mortgage—Limitation of Actions.—A junior mortgagee of land who is not made a party to an action by the senior mortgagee to foreclose his mortgage, may redeem from a sale thereunder, if the junior brings his action therefor within ten years after his right of action to foreclose his mortgage accrues, p. 308.

Reaffirmed in Crawford v. Taylor, Richards & Burden, 42 Iowa 263; Floyd County v. Cheney, 57 Iowa 163, 164, 10 N. W. 325; Albee v. Curtis & Morey, 77 Iowa 647, 42 N. W. 508; Adams v. Holden, 111 Iowa 59, 60, 82 N. W. 470.

Cited in Day v. Baldwin, 34 Iowa 383, 384, the court holding that an action to foreclose a vendor's lien on land is barred—under Sec. 2740 of the Code of 1860—unless commenced in ten years from the time the cause of action accrued.

Cited in Palmer v. Butler, 36 Iowa 583, not in point.

Cited in Clinton County v. Cox, 37 Iowa 571, 572; Boynton v. Salinger, 147 Iowa 541, 125 N. W. 996, holding—as does the present case in argument—that a mortgage is only a lien for the debt it is

given to secure, and continues in force and action is maintainable thereon as long as the debt is in force and may be sued on.

Cited in Jameson v. Perry, 38 Iowa 18, the court holding—as does the present case in argument—that an action to foreclose a mortgage on land is barred unless commenced within ten years after the cause of action accrues.

Distinguished in Green v. Turner, 38 Iowa 116-119, holding that an owner of land may maintain an action in equity to cancel a mortgage more than ten years after the maturity of the mortgage, when he alleges that the mortgagee went into possession of the land and was paid by rents and profits thereof, and timber sold therefrom.

Unreported citation, 126 N. W. 371; 130 N. W. 729; 135 N. W. 648; 135 N. W. 740, 745.

2. Mortgage on Land—Nature of—Action by Junior Mortgagee to Redeem—Purchaser under Senior Foreclosure Sale in Possession to Account for Rents and Profits.—A mortgage on land is only a lien thereon for the debt it is given to secure.

In an action by a junior mortgagee of land to redeem from a sale under the foreclosure of a senior, a purchaser thereunder who is in possession of the land will be charged with rents and profits, pp. 307, 308.

Reaffirmed in Green v. Turner, 38 Iowa 116-119, holding that an owner of land may maintain an action in equity to cancel a mortgage more than ten years after the maturity of the mortgage, when he alleges that the mortgagee went into possession of the land and was paid by rents and profits thereof and by timber sold therefrom.

Reaffirmed and explained in Spurgin v. Adamson, 62 Iowa 667, 18 N. W. 296, holding that a mortgagee in possession of land, either before foreclosure, or under foreclosure sale and a deed made thereon, must account for rents and profits, and, in a proper case, be credited for improvements, upon redemption by a junior incumbrancer: And that a purchaser under a foreclosure of a mortgage, as to a junior incumbrancer entitled to redeem for the reason that he was not made a party to the foreclosure proceeding, is regarded as the assignee of the mortgage, and holds no other rights than would be held by the mortgagee, were redemption made by the mortgage was held by him, or were he the purchaser at the foreclosure sale; and such a mortgagee or purchaser should also be credited with taxes paid on the land.

Reaffirmed and explained as to first paragraph in Grether v. Clark, 75 Iowa 385, 9 Am. St. Rep. 491, 39 N. W. 656, holding that the title and right of possession is in the mortgagor, and they continue until divested by a sale and deed under foreclosure proceedings; and that a grantee of the mortgagor before the foreclosure acquires the same rights.

Reaffirmed and explained as to first paragraph in Busch v. Hall, 119 Iowa 282, 93 N. W. 357, holding that a mortgagee may redeem from a tax sale of land.

Cited in Hodgdon, Ex'x, v. Heidman, 66 Iowa 647, 24 N. W. 258, the court holding that a mortgagor, or the grantee of the mortgagor, or a subsequent incumbrancer, in possession of land, does not hold adversely to the mortgagee.

CHASE v. SCOTT, 33 IOWA 309

1. Partnership—Sale by One Partner of His Interest in the Property—Rights of Other Partner.—Where one partner, with the consent of the other, sells his interest in the partnership property the remaining partner has a right to retain the property for the purpose of winding up the partnership business, such sale operating as a dissolution of the partnership, p. 316.

Reaffirmed in Tuller v. Leaverton, 143 Iowa 165, 121 N. W. 516.

BEAL v. BLAIR, 33 IOWA 318

1. Conveyance—Certainty of Description.—A description in a conveyance describing the land as situated in a certain county "commencing at the southeast corner of section twenty-one (21), Tp. eighty-four (84) R. twenty-six (26)," etc., is sufficiently certain, as there is no other such township or range in Iowa, p. 320.

Cited in Ottumwa, Cedar Falls & St. P. Ry. Co. v. McWilliams, 71 Iowa 168, 32 N. W. 317, holding that a description in a conveyance to land describing it as in Poweshiek County, Iowa, "Secs. 22 and 28, Township 79, R. 13," is sufficiently definite.

2. Deed of Trust to Sheriff and Successors in Office—Power of Successor under.—A deed of trust executed to a named sheriff *and his successors in office*, given by the grantor to secure a debt, grants the powers thereunder to a successor in office to the sheriff therein named, p. 321.

Reaffirmed and extended in Moore v. Isbel, 40 Iowa 387, holding further that when a trust deed provides for the appointment in a certain manner of a new trustee in case the trustee named fails to act, the trustee so appointed has the same powers as the one named in the instrument.

3. Trust Deed—Sale and Deed under, Recitals in as Evidence.—A deed to land executed by a trustee upon a sale of land under a trust deed and acknowledged and recorded, is *prima facie* evidence of the recitals of fact therein contained, p. 323.

Reaffirmed in Ingle v. Jones, 43 Iowa 293.

Reaffirmed and varied in Henderson v. Robinson, 76 Iowa 607, 41 N. W. 373, holding that the rule is equally applicable to the recitals in a court's deed to land.

Distinguished in Lawless v. Stamp, 108 Iowa 603, 79 N. W. 373, holding that recitals in a receiver's deed as to his appointment and authority to act are not *prima facie* evidence of such facts.

HUBBARD & SPENCER v. HARTFORD FIRE INSURANCE CO., 33 IOWA 325,
11 AM, REP. 125

1. Fire Insurance—When Policy Commences.—Where insured applies to an agent of a fire insurance company for a policy of insurance on certain property, and it is agreed between them that the policy should be issued and sent to the insured on that date, the delivery of the policy and collection of premium on a later date, when the policy is dated of the first named day does not change the time it commences to run, but it is in force from the time of its date aforesaid, pp. 327, 328.

Reaffirmed in Taylor v. State Ins. Co., 107 Iowa 277, 77 N. W. 1033.

Reaffirmed and extended in Bortcher v. Hawkeye Ins. Co., 47 Iowa 254, 256, holding that when an application for fire insurance is made out, dated and signed on a certain day, and applies for a policy of insurance on property for one year from that date, and is thereon forwarded by the agent to the company, with the premium, a policy later issued and delivered bearing another date is in force from the date of the application.

2. Fire Insurance—Contract for Insurance—Effect.—Where an agent of a fire insurance company having power to issue policies, agrees with one applying for insurance, upon the terms thereof, but, having no blanks on hand, executes a receipt for the premium paid and which specifies the property to be insured and stipulates that a policy will be issued as soon as a blank is received, the contract and receipt operates as a contract of insurance from the date of the receipt, and in all respects like a policy issued on the usual blank, pp. 327, 328.

Reaffirmed in Smith v. State Ins. Co., 64 Iowa 718, 21 N. W. 146; Barre v. Council Bluffs Ins. Co., 76 Iowa 611, 41 N. W. 374; House v. Security Fire Insurance Co., 145 Iowa 468, 121 N. W. 511.

Reaffirmed and varied in Taylor v. State Ins. Co., 98 Iowa 524, 60 Am. St. Rep. 210, 67 N. W. 578, holding that an agent of a fire insurance company who has power to make contracts of insurance and to issue policies, has the power to correct the description of property in a policy and include other property therein which was covered by the contract for insurance, but was omitted from the policy by mistake; and such correction may be made by the agent either before or after the loss of the property by fire, if during the continuance of the agency.

Reaffirmed and qualified in Sater v. Henry County Farmers' Ins. Co., 92 Iowa 581, 582, 61 N. W. 210, holding that in order for a parol contract to execute a policy of insurance to be valid, it must be definite as to amount of insurance, amount of rate, and all other requisites to any other contract: That a parol agreement for renewal of insurance on property, which fails to stipulate the amount of insurance or the rate, and leaves them undetermined, is not binding, and cannot be made the basis of an action, either on the contract or for damages for failure to perform—and see to the same effect, Taylor v. State Ins. Co., 107 Iowa 277, 77 N. W. 1033 (reaffirming and qualifying the text), involving the requisites to a valid parol contract for insurance.

Cross reference. See further on this question, annotations under Rule 3 of City of Davenport v. Peoria Marine & Fire Ins. Co., (17 Iowa 276), Vol. II, p. 527.

3. Fire Insurance—Condition in Policy against Other Insurance—Effect—Breach—Other Insurance Must be Valid.—Where a policy of fire insurance contains a stipulation that the policy shall be forfeited if other insurance is effected on the property, a breach of the condition and issuance of another policy does not render the first policy void, but merely *voidable* at the option of the first company upon obtaining knowledge of the breach or subsequent insurance. If, upon learning of the breach or subsequent insurance, the first company makes no objection or treats its policy as valid, the policy may be enforced.

In order for the subsequent insurance to work a forfeiture of the prior policy, the subsequent policy of insurance must be valid, pp. 329-331.

Reaffirmed in Behrens v. Germania Fire Ins. Co., 64 Iowa 22, 23, 19 N. W. 839.

Cited as to second paragraph in Weigen v. Council Bluffs Ins. Co., 104 Iowa 412, 73 N. W. 863, the case turning on another point.

Cross references. See further on this question, annotations under Viele v. Germania Ins. Co., (26 Iowa 9), ante. p. 298; David v. Hartford Ins. Co., (13 Iowa 69), Vol. II, p. 120.

4. Fire Insurance—Condition in Policy on Personal Property That Insured Is "Sole and Unconditional Owner"—Chattel Mortgage.—The fact that there is a mortgage on personal property on which a policy of fire insurance is issued, does not render it void under a condition therein that it is to be void if the insured is not the "sole and unconditional owner."

The property or title in chattels is absolutely and unconditionally in the mortgagor thereof, the mortgagee only obtaining a lien thereon to secure his debt, p. 333.

Reaffirmed as to second paragraph in Kern & Son v. Wilson, 73 Iowa 492, 35 N. W. 595; Harvard v. Davenport, 105 Iowa 597, 75 N. W. 489. -

Reaffirmed and extended in Taylor v. Merchants' & Bankers' Ins. Co., 83 Iowa 403, 404, 48 N. W. 996, holding further that where a policy of fire insurance is issued on the interest of a materialman in a building used as a mill and the machinery therein, the subsequent execution of a chattel mortgage on the machinery by the owner thereof to the materialman for the amount of the latter's lien, does not affect the validity of the policy under a condition therein that it shall be void if any change takes place in the title, ownership or possession of the property insured.

Reaffirmed and extended as to second paragraph in Fuller & Co. v. Hunt, 48 Iowa 166, holding further that a mortgage on land simply creates a lien thereon.

5. Fire Insurance—Proofs of Loss—Statement in as to Subsequent Insurance Does Not Estop Insured to Deny Its Validity, When.—Where insured in compliance with a policy of fire insurance states in his proofs of loss that there was a subsequent policy of insurance issued by another company on the property, he is not thereby estopped to set up the invalidity of the last policy in avoidance of a stipulation in the first rendering it void if subsequent insurance is issued on the property, pp. 334-336.

Cited in Miller v. Hartford Fire Ins. Co., 70 Iowa 707, 29 N. W. 412, the court holding that where insured makes a reasonable effort to comply with the terms of a policy of fire insurance as to proofs of loss, and such proofs contain erroneous statements which could in no way prejudice the company, the latter cannot complain thereof, nor is the former precluded from showing the true facts.

6. Estoppel in Pais—What Sufficient to Constitute.—Where one does acts or makes assertions or admissions of fact designed to influence the conduct of another and upon which the latter acts, he will be estopped to claim or prove the contrary as against the one relying and acting thereon, p. 335.

Reaffirmed and explained in Ross v. Ferree, 95 Iowa 607, 64 N. W. 684, holding—as does the present case—that estoppels must be certain to every intent, for no one should be denied setting up the truth unless it is in plain and clear contradiction of his former acts and declarations: And holding also, that where one, in honest error, asserts that which is true, and does so for the purpose of influencing another, who, in good faith, trusts to and acts upon it, he that made the mistake shall not correct it for his own benefit, and to the injury of the party who was deceived by his assertions; and that a party is estopped from contradicting his own representations, on the strength

of which another has acted, even where such representations were made in good faith, and in ignorance of the facts.

Reaffirmed and explained in Criley v. Cassell, 144 Iowa 688, 689, 123 N. W. 349, holding that a party may not deny that which he has solemnly asserted to be true when such denial will prejudice one who has relied upon his former statement; and that he will be estopped, although he was in error as to the truth, if his statement was intended to, and did, influence another to act thereon.

McKEWER v. KIRTLAND, 33 IOWA 348

1. Negotiable Note—Indorsement After Due—Demand and Notice Required to Charge Indorsers.—Where a negotiable note is indorsed after it is due, demand of payment on and notice of non-payment by the maker, must be made and given within a reasonable time after the note became due, in order to charge the indorsers thereof, p. 350.

Reaffirmed in Pryor v. Bowman, 38 Iowa 92, 93.

Reaffirmed and explained in Graul v. Strutzel, 53 Iowa 713, 36 Am. Rep. 250, 6 N. W. 119, holding that a negotiable note indorsed after due must be presented to all the makers for payment within a reasonable time, and notice of non-payment must be given to the indorser immediately, which means, at furthest, the next day after default, where the parties reside in the same town.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

ATHERTON v. DEARMOND, 33 IOWA 353

1. Written Contracts, Notes, and Instruments—Parol Evidence of Contemporaneous Agreement Not Admissible to Vary or Control.—Parol evidence of a contemporaneous agreement is inadmissible to vary or control a written contract, note or other instrument, p. 355.

Reaffirmed in Dickson v. Harris, 60 Iowa 729-731, 13 N. W. 336, 337; Mason v. Mason, 72 Iowa 459, 34 N. W. 209; De Long v. Lee, 73 Iowa 54, 34 N. W. 614; Marsh v. Chown, 104 Iowa 561, 73 N. W. 1048; Mosnat v. Uchytel, 129 Iowa 276, 105 N. W. 519.

Reaffirmed and explained in Allen v. Bryson, 67 Iowa 594, 595, 56 Am. Rep. 358, 25 N. W. 822, holding that a bill of sale cannot be varied or limited by proof of a contemporaneous parol agreement by which it was in fact a bailment.

Reaffirmed and explained in Kelly v. C. M. & St. P. Ry. Co., 93 Iowa 444-446, 61 N. W. 960, holding that when, by the express terms of the written agreement a particular condition is made the consideration for the undertaking, it is no more competent to contradict or vary its

terms by parol evidence as to the consideration by which it is supported, than as to its other conditions.

Reaffirmed and extended in Am. Em. Co. v. Clark, 47 Iowa 674, holding that the rule applies to checks and all commercial paper.

Reaffirmed and narrowed in First Nat'l Bank of Grundy Center v. Snyder Bros., 79 Iowa 195-197, 44 N. W. 357, holding that parol evidence is never admissible to alter, vary or contradict the written contract; yet that it is admissible to show what the consideration was, unless the consideration is expressed in the instrument in such unmistakable language that parol evidence is not necessary to understand it.

Distinguished in Simpson Centenary College v. Bryan, 50 Iowa 298, 299, holding that parol evidence of a contemporaneous agreement which constitutes the consideration of a note, but reaches no further and does not render the note uncertain or contingent as to amount, is admissible in an action thereon and to prove a failure or want of consideration.

Distinguished in Dicken v. Morgan, 54 Iowa 686, 7 N. W. 145, holding that an independent oral agreement which constitutes all or part of the consideration for a written contract or note, may be shown by parol in an action on the latter, and in order to show a breach of the agreement and a consequent failure of consideration.

(Note.—Neither fraud, accident or mistake was involved in the present case or its annotations.—Ed.)

STATE v. HARRIS, 33 IOWA 356

I. Criminal Law—Trial—Continuance at First Term after Arrest—When.—Under Secs. 4723, 4725 of the Code of 1860, an accused person, if not in custody, or on bail, or if he has not deposited money in lieu of bail, cannot be required, unless he consents, to go to trial at the term at which an indictment is returned against him; and in such case the prosecution must be continued to the next term of court; and this without motion or showing by the accused, pp. 357-359.

Reaffirmed in State v. Schane, and other consolidated cases, 34 Iowa 594 (abstract).

STATE v. CURLEY, 33 IOWA 359

I. Intoxicating Liquors—Nuisance—Indictment for Need Not Negative Statutory Exceptions Making Keeping Lawful—Exceptions—Defenses—Burden of Proof.—An indictment for violation of the intoxicating liquor law, or for maintaining a nuisance in violation thereof, need not negative the exceptions in the statute which make a sale or keeping of intoxicating liquors lawful; but such fact, if it existed, must be proved by accused as a defense, pp. 360, 361.

Reaffirmed in State v. Miller and Kremling, 53 Iowa 87, 4 N. W. 838.

Reaffirmed, explained and varied in State v. Kendig, 133 Iowa 168, 169. 110 N. W. 465, holding that when an exception is embodied in the body of the enacting clause, it must be alleged in the indictment; but that when, in a statute, there is a clause for the benefit of the State, and afterwards follows a proviso or exception in favor of the defendant, the latter is a matter of defense and need not be alleged in the indictment: Hence holding that an indictment for practicing medicine without a license, under Secs. 2579, 2580 of the Code of 1897, need not negative the exceptions contained in such sections.

Unreported citation, 106 N. W. 268.

Cross reference. See further on this question, annotations and cross reference under State v. Stapp (29 Iowa 551), ante. p. 559.

STATE v. KNOUSE, 33 IOWA 365

1. Criminal Law—Appeal—Reversal—Docketing and Trial Below without Procedendo.—Where upon appeal in a criminal case the judgment of conviction is reversed and a new trial ordered by the Supreme Court, the district court may, without a *procedendo* from the higher court, proceed to redocket and try the case, if no objection is made by the State or by the accused to so proceeding; pp. 366, 367.

Reaffirmed and extended in Becker v. Becker, 50 Iowa 140; Hogle v. Smith, 136 Iowa 36, 113 N. W. 557, holding further that upon reversal by the Supreme Court and after the expiration of the period for filing a petition for a rehearing and when none has been filed, the trial court may, by agreement of parties or upon notice to the parties, proceed to redocket and try the cause without a *procedendo* having issued from the higher court.

SIMS v. HAMMOND, 33 IOWA 368

1. Mortgages on Land—Priority—Person Taking Second Mortgage with Actual Notice of Prior Unrecorded One—Assignee of Second Mortgagee, Rights of.—Where a person takes a mortgage on land with actual notice of a prior unrecorded one thereon, the prior mortgage is the superior lien and the second mortgagee takes subject thereto. And an assignee of the second mortgage who takes after the prior one was recorded, succeeds only to the rights of his assignor (second mortgagee), although the second mortgage was recorded before the prior one, pp. 372, 373.

Cited in Raymond v. Whitehouse, 119 Iowa 139, 93 N. W. 295, the court holding that where a mortgagee releases his conveyance of record, he cannot thereafter by an action in equity, cancel such release and re-establish the mortgage, thereby affecting the rights of a person who acted on the faith of such release.

Cited in Port v. Robbins, 35 Iowa 210, not in point.

Distinguished and narrowed in Farmers' Nat'l Bank of Salem v. Fletcher, 44 Iowa 256; Clasey v. Sigg, 51 Iowa 372, 1 N. W. 591, holding that a *bona fide* assignee, for value, of a mortgage and note secured thereby, who takes without notice of equities or infirmities, takes free therefrom—the last case holding further that where a mortgagee transfers his mortgage and note secured, to a bank as collateral for money “owed and which he might owe” to it, that such bank has priority under such mortgage for all money loaned or advanced thereon, over a mortgagee of a prior mortgage which is not recorded until after such transfer, in the absence of actual notice to such bank of the existence of such prior conveyance.

Distinguished and narrowed in Powers v. Lafler, 73 Iowa 284, 285, 34 N. W. 860, holding that where two mortgages to secure debts to separate persons and on the same property are executed on the same date, and both are placed of record, and there is nothing of record to show which one is senior, that such record does not impart constructive notice of such fact or put a third person upon inquiry as to it.

(Note.—The present case seems to turn on peculiar facts and the citing cases doubt the rule. See specially in this connection, annotations under Rule 2 of English v. Waples (13 Iowa 57), Vol. II, p. 118.—Ed.)

NYCUM v. McALLISTER, 33 IOWA 374

1. Public Lands—Homestead—Right of Settler to Mortgage before Patent Issues.—Where an actual settler on public land occupies it as homestead for the five years prescribed by the Homestead Law and otherwise complies with the provisions thereof, he may execute a mortgage thereon before a patent issues therefor. Sec. 4 of the Act of Congress of May 20, 1862, does not forbid the execution of such a mortgage, pp. 375, 376.

Reaffirmed and extended in Fuller & Co. v. Hunt, 48 Iowa 164-166, holding further that a person who has entered upon land under the Homestead Act can make a valid mortgage upon it prior to the time when he is entitled to make final proof and have patent issued.

Distinguished in Oaks v. Heaton, 44 Iowa 121, the case turning on other provisions of the Homestead Act.

HUNTER v. BOARD OF SUPERVISORS, 33 IOWA 376, 11 AM. REP. 132

1. Taxation and Revenue—Situs for Taxation of Personal Property, Money, Debts, etc.—Notes in another State.—Under Sec. 712 of the Code of 1860, the *situs* for taxation of personal property, money, and debts is in the county wherein the owner resides in this State. And this is the rule although notes evidencing such debts are in a foreign state.

But moneys and credits belonging to a resident of this State, but under the control or management of an agent in another state for the purpose of being invested, loaned or used for pecuniary profit by the agent, is not subject to taxation here, pp. 379, 380.

Reaffirmed as to first paragraph in City of Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 84, 85, holding that the rolling stock of a railroad company is subject to municipal taxation in the city wherein it has its chief place of business in this state.

Reaffirmed and varied as to first paragraph in Burns v. McNally, 90 Iowa 438, 441, 57 N. W. 911, holding that—under Secs. 803, 805 of the Code of 1873—where there are two executors, both having actual possession of personal property of the decedent, and both residing in the same county, but in different taxing districts, each should return to the assessor of his township for taxation such personal property of the decedent as may be in his immediate possession in his township, unless the personal property in possession of an executor in his township at the time assessment is required to be made has a fixed and abiding place or location in another township, in which case it is to be assessed in the latter.

Reaffirmed and varied as to first paragraph in Gilbertson, State Treasurer, v. Oliver, Ex'r, 129 Iowa 570, 571, 4 L. R. A. (New Series) 953, 105 N. W. 1003, holding that a debt has its *situs* at the residence of the creditor: And holding *a fortiori* that debts evidenced by notes, certificates of deposits of banks, mortgages, etc., owned by a testator who, at the time of her death, was a non-resident, were not subject to an inheritance tax, although the debtors reside in this state.

Reaffirmed and varied as to second paragraph in Hutchinson v. Brd. of Equalization of City of Oskaloosa, 66 Iowa 39, 40, 23 N. W. 251, holding that under Sec. 817 of the Code of 1873, money under the control and management of an agent in this state for the purpose of being loaned for pecuniary profit, but belonging to a resident of a foreign state or country, is subject to taxation in the county and city of this state wherein the agent resides, such money to be listed in the name of the agent; and he is personally liable therefor—and holding that Sec. 817 of the Code of 1873, is constitutional.

THORNBURGH v. MADREN, 33 IOWA 380

1. Principal and Surety—Estoppel of Creditor to Enforce Debt against Surety.—Where a creditor or his agent represents to a surety that the debt for which he is bound has been paid, and the surety relies on such representations and does not give the statutory notice requiring the creditor to sue or allow him to sue, the creditor cannot enforce the debt against the surety if the latter will thereby suffer loss, p. 384.

Reaffirmed and extended in Rowley v. Jewett, 56 Iowa 496, 497, 9 N. W. 355, holding further that if the surety has been lulled into

security by the acts and conduct of the creditor, and in consequence thereof fails to obtain indemnity or make an effort to do so, he is wholly discharged; but if he only surrenders certain property held by him as collateral security to the principal debtor, and has not been otherwise damaged, he is discharged only to the extent of the value of the property surrendered.

Reaffirmed and extended in Wolf v. Madden, 82 Iowa 116, 117, 47 N. W. 982, holding further that where the holder of a note agrees with the surety thereon that he will look to the principal for payment, and thereby prevents the surety from proceeding under the statute or otherwise to protect himself, the surety is discharged.

Reaffirmed and varied in Lyon v. Aiken, 70 Iowa 18, 29 N. W. 786; Reintz & De Buhr v. Uhlenhopp, 149 Iowa 291, 128 N. W. 403.

Cited with approval in Hubbard v. Hart, 71 Iowa 670, 33 N. W. 234; Auchampaugh v. Schmidt, 77 Iowa 15, 41 N. W. 473, the facts not bringing the cases within the rule.

Cross reference. See further on this question, annotations under Chambers v. Cochran and Brock (18 Iowa 159), Vol. II, p. 606.

SOWARD v. CHICAGO & NORTHWESTERN R. R. Co., 33 Iowa 386

1. Railroads—Liability for Killing or Injuring Stock.—A railroad company is not liable under Chap. 169, Acts of 1862, for killing or injuring stock at a highway crossing, although the highway or the portion thereof where the animals were killed or injured was established by dedication. Under such Act above, the railroad is not obliged to fence its track at any highway crossing, pp. 388-390.

Reaffirmed in Sarver v. C. B. & Q. R. R. Co., 104 Iowa 61, 62, 73 N. W. 498, a case wherein the railroad company was held liable under the law of the text, for the killing of stock at a highway where the portion thereof which was not fenced and where the killing occurred was not established by dedication, there being no proof of its acceptance by the public.

BARKDULL v. CALLANAN, 33 Iowa 391

1. Pleadings—Practice—Petition Stricken from Files—Permission to Refile—Discretion of Trial Court.—Where a petition has been stricken from the files on motion and without objection, the trial court may in the exercise of a sound judicial discretion permit it to be refiled: But his refusal to do so will not be ground for reversal except in case of abuse of such discretion and resulting prejudice to the plaintiff who is appealing.

This rule applies to any paper of record and which is so stricken and later desired to be refiled, p. 395.

Cited in Ricard v. Ricard, 143 Iowa 185, 20 Am. & Eng. Ann. Cas., 1346, 121 N. W. 526, not in point, but upon analogy.

STATE *v.* STUCKER, 33 IOWA 395

1. Intoxicating Liquors—Nuisance—Bar-tender or Clerk May be Convicted of.—A bar-tender or clerk may, under Secs. 1562, and 1564 of the Code of 1860—be convicted of nuisance for unlawfully selling intoxicating liquors in a building kept for such purpose by his employer, pp. 396, 397.

Reaffirmed and varied in Worley *v.* Spurgeon, 38 Iowa 466, holding that the rule is equally applicable to the liability in damages of a bar-tender, clerk or servant, in an action therefor by a wife of one to whom intoxicating liquor is sold in violation of Chap. 47, Acts of 1862 (9th General Assembly).

DOULON *v.* CITY OF CLINTON, 33 IOWA 397

1. Municipal Corporations—Liability for Obstructions to or Defects in Sidewalks—Negligence to be Affirmatively Shown.—Before a city can be held guilty of negligence, on account of defects in the sidewalks (not arising from their original construction), or for an obstruction placed thereon by a wrong-doer, either express notice of the existence of the defect or obstruction must be brought home to it, or they must be so notorious as to be observable by all.

In an action against a city for personal injuries caused by reason of a defective sidewalk, negligence must be affirmatively shown; and the mere existence of a defect in the sidewalk is not enough to establish negligence on the part of the corporation. It must in some way be connected with the defect, either as having directly caused it, or having assented to its creation by another, or as having, with a knowledge of its existence, permitted it to remain, pp. 399, 401.

Reaffirmed in Creamer *v.* City of Burlington, 39 Iowa 515.

Reaffirmed as to first paragraph in Thomas *v.* City of Brooklyn, 58 Iowa 440, 10 N. W. 850; Cason *v.* City of Ottumwa, 102 Iowa 104, 71 N. W. 194.

Reaffirmed and explained in Bender *v.* Town of Minden, 124 Iowa 688, 100 N. W. 353, holding that a city is only liable in damages for personal injuries received by reason of workmen failing to barricade or guard a hole in a sidewalk, when the city officials fail to use ordinary care and diligence to see that this is done; and that what constitutes such care and diligence is to be determined from all the facts and circumstances, such as the size of the city, the amount of travel, the customs and habits of the workmen, the duties imposed on the municipal officers, etc.

Reaffirmed and narrowed as to first paragraph in Smith *v.* Sioux City, 119 Iowa 53, 93 N. W. 82, holding that a municipal corporation, charged with the duty of maintaining its streets in reasonably safe condition for public use, is held to have notice of dangerous defects therein, and especially defects arising from natural wear and decay,

whenever such condition has existed so long that, in the exercise of reasonable oversight and care by the officers of the municipality, it should have been discovered and repaired.

Cross references. See further on this question, annotations under *Rowell v. Williams* (29 Iowa 210), ante. p. 515.

2. Appeal—Verdict Manifestly against Evidence—Reversal.—

Where upon appeal the record shows that the verdict of the jury was clearly unsupported by the evidence, the judgment will be reversed, p. 401.

Reaffirmed in *Woodward v. Squires & Co.*, 39 Iowa 438.

Cross references. See further on this question, annotations and cross reference under Rule 2 of *McKelvey v. Thorington* (15 Iowa 25), Vol. 2, p. 298; *Shepherd v. Brenton* (15 Iowa 84), Vol. II, p. 308.

RUDDICK, ASSIGNEE, v. OTIS & SNOW, 33 IOWA 402

1. Partnership—What Sufficient to Constitute as between Parties.—In order to constitute a partnership as between the parties there must be an agreement or arrangement whereby they are to share in both the profits and the losses of the business or undertaking, p. 404.

Reaffirmed in *Clark v. Barnes & Sons*, 72 Iowa 566, 34 N. W. 420; *Winter v. Pipher & Co.*, 96 Iowa 21, 22, 64 N. W. 664; *Richardson & Co. v. Carlton*, 109 Iowa 521, 80 N. W. 534; *Matthews v. Luers Drug Co.*, 110 Iowa 232, 81 N. W. 465; *Johnson Bros. v. Carter & Co.*, 120 Iowa 359-361, 94 N. W. 851, 852.

Reaffirmed and explained in *Richards v. Grinnell*, 63 Iowa 51, 52, 50 Am. Rep. 727, 18 N. W. 671; *Haswell v. Standring*, 152 Iowa 306, 307, holding that it is not necessary, in order to constitute a partnership as between the parties that there be an express agreement that each party shall bear a share of any losses which may occur in the business; but that this may be inferred from the other provisions of the contract, and the nature of the business, and the relation of the parties to the business to be transacted.

Reaffirmed and explained in *Heard v. Wilder*, 81 Iowa 425, 46 N. W. 1076, holding that to constitute a partnership as between the parties there must be a joint ownership of partnership funds according to the intention of the parties, and an agreement, either expressed or implied, to participate in the profits or losses of the business, either ratably or in some other proportion to be fixed upon by the co-partners.

(Note.—There are many other cases in this state sustaining, but not citing the text.—Ed.)

2. Partnership—Evidence—Action by Assignee in Bankruptcy of One Partner against Other Partner—Competency of Latter to Testify Where First Named Partner Is Dead.—In an action by an assignee in bankruptcy of one partner against the other partner for

the amount claimed to be due by the latter to the former by reason of the partnership, the defendant (partner) may—under Sec. 3982 of the Code of 1860—testify as to transactions had with his partner, although the bankrupt partner is dead, pp. 405, 406.

Cited with approval in McElroy v. Allfree, 131 Iowa 117, 117 Am. St. Rep. 412, 108 N. W. 118, the case turning on other questions.

HUSE v. McDANIEL, 33 IOWA 406

1. Payment—Novation—Transfer by Debtor of Bill of Exchange or Note of Third Party—When Operates as Payment of Existing Debt.—The transfer, by a debtor to his creditor, of a promissory note or bill of exchange of a third party on account of an existing debt, in the absence of an agreement that it shall be taken in absolute payment, operates only as a conditional payment, and does not defeat recovery upon the original indebtedness in case of the non-payment of the paper of the third party. And this rule is the same whether the instrument transferred is negotiable or non-negotiable, and is unaffected by the fact that it is not indorsed by the debtor, pp. 408, 409, 412, 415.

Reaffirmed in Farwell v. Grier, 38 Iowa 87; Hunt & Co. v. Higman, 70 Iowa 410, 411, 30 N. W. 771.

Reaffirmed and explained in Beach & Weld v. Wakefield, 107 Iowa 574, 76 N. W. 690, holding that the giving of an order on a third person will operate as payment of a precedent debt, if there is an express agreement to that effect.

Reaffirmed and extended in Dille v. White, 132 Iowa 341-343, 346, 347, 10 L. R. A. (New Series) 510, 109 N. W. 916, holding further that payment by check is dependent upon it being duly honored and cashed, in the absence of an express agreement that it is accepted in satisfaction of the debt: That where a party borrows money executing a mortgage to secure the loan, and accepts checks therefor, that upon their being dishonored, equity will cancel the contract and place the parties in *statu quo*.

Cross references. See further on this question, annotations under Farwell & Co. v. Salpaugh (32 Iowa 582), ante. p. 779; Rule 2 of McLaren v. Hall (26 Iowa 297), ante. p. 328; Kephart v. Butcher (17 Iowa 240), Vol. II, p. 522.

STATE v. RICHARDS, 33 IOWA 420

1. Rape—Evidence—Complaint by Prosecutrix, Admissible.—Upon the trial of an indictment for rape the fact that a short while after the time of its alleged commission the prosecutrix made complaint thereof, is admissible in evidence in behalf of the State; but this rule only applies when she is a witness; and the *particulars* of or her *narration of the facts* concerning the commission of the crime are

not admissible in corroboration of her testimony as a witness, and can only be elicited upon cross examination, pp. 421, 422.

Reaffirmed in State v. Clark, 69 Iowa 295, 296, 28 N. W. 607; State v. Wheeler, 116 Iowa 214, 93 Am. St. Rep. 236, 89 N. W. 979.

Reaffirmed and explained in State v. Novak, 151 Iowa 538, holding that upon the trial of an indictment for rape or for assault with intent to commit rape, when the prosecutrix is a witness, evidence of her having made complaint is limited to the facts of the commission thereof and the identity of the man she charged therewith.

Reaffirmed and qualified in State v. Mitchell, 68 Iowa 119, 26 N. W. 46; State v. Peterson, 110 Iowa 650, 82 N. W. 329, holding that evidence of the complaint by prosecutrix may go to the extent of showing of what injury she complained.

Reaffirmed and extended in State v. Peterson, 110 Iowa 649, 650, 82 N. W. 329, holding further that upon the trial of an indictment for rape where the injured female is a witness, the fact that she made complaint thereof, although not immediately after the time of its alleged commission, is admissible in evidence and that where she delayed making complaint, she may explain the reason for delaying.

Cited in State v. Desmond, 109 Iowa 77, 80 N. W. 215, not in point, but upon analogy.

Distinguished in McMurrin v. Rigby, 80 Iowa 325, 45 N. W. 878, an action for damages for rape wherein the declarations of the plaintiff (injured female) were held to be properly admitted as part of the *res gestae*, they being made immediately after the commission of the rape.

Unreported citation 132 N. W. 26.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

RICHMOND v. DUBUQUE & SIOUX CITY R. R. Co., 33 IOWA 422

(Former Appeal, 26 Iowa 191; Later Appeal 40 Iowa 264.)

1. Injunction in Action at Law—Action for Breach of Contract, etc.—Secs. 3798, 3799 of the Code of 1860, construed.—Secs. 3798 and 3799 of the Code of 1860 allowing an injunction in an action at law and providing for judgment, damages, etc., does not confer equity jurisdiction, but only provides an additional remedy to prevent similar breaches of the contract sued on or the wrong complained of or right invaded, p. 476.

Cited in Duroc & Conley v. Stephens, 101 Iowa 362, 70 N. W. 611, not in point.

2. Contracts—Specific Performance—When Equity Takes Jurisdiction.—Equity will not take jurisdiction for the purpose of specifically enforcing a contract when there is an adequate remedy at law in damages.

The application of the rule is governed by the particular facts of each case when equitable principles are thereto applied, pp. 480, 481.

Reaffirmed in Stewart v. Pierce, 116 Iowa 744, 89 N. W. 239; Hull v. Hull, 117 Iowa 65, 90 N. W. 497.

Reaffirmed and explained in Sweeney v. O'Hara, 43 Iowa 38, 39, holding that where an agreement in regard to an interest in realty has been partly performed, its terms are clearly defined and satisfactorily established, and it is not shown to be unconscionable or unreasonable, it must be specifically enforced in equity: Holding also, that the discretion of the court in the matter of decreeing or refusing to decree specific performance of a contract in relation to land must not be arbitrarily or capriciously exercised, but should be governed as far as may be, by general rules and principles.

Reaffirmed and explained in Robinson v. Luther, 134 Iowa 464, 109 N. W. 775, holding that it is a fundamental rule that specific performance rests in the judicial discretion of the chancellor, and that the remedy of specific performance will not be administered save upon an application that is based upon a valuable consideration; and that equity will not enforce the specific performance of a contract where compensation in damages will constitute adequate relief.

Distinguished in Iler v. Griswold, 83 Iowa 445, 49 N. W. 1024, holding that where in an action in equity involving the title to land in which plaintiff is entitled to equitable relief, but because of the peculiar circumstances, a money judgment can more easily and definitely determine the rights of the parties, the chancellor will enter such money judgment.

Cross references. See other rules hereof. See further on this question, annotations under Rule 2 of Harper v. Sexton (22 Iowa 442), ante. p. 52.

3. Contracts—Specific Performance—When Equity Will Not Grant Relief—Mutual Covenants—Executory Contracts.—Equity will not specifically enforce the covenants of a contract against one party, unless the other party thereto could be similarly compelled to perform his covenants therein.

Specific performance of an executory contract requiring personal services, labor or skill of one of the parties, will not be decreed, pp. 486, 487.

Reaffirmed in Boyd v. Woodbury County, 122 Iowa 458, 459, 98 N. W. 276.

Reaffirmed as to first paragraph in Luse v. Deitz, 46 Iowa 206, 207; Ormsby v. Graham, 123 Iowa 209, 98 N. W. 727; Gossard Co. v. Crosby, 132 Iowa 169, 62 L. R. A. (New Series) 1115, 109 N. W. 488.

Reaffirmed as to second paragraph in Gossard Co. v. Crosby, 132 Iowa 170, 62 L. R. A. (New Series) 1115, 109 N. W. 488; Newman v. French, 138 Iowa 485, 116 N. W. 469.

Unreported citation, 134 N. W. 564.

4. Practice—Actions—Action on Wrong Docket—Motion to Transfer, Failure to Make—Waiver.—Under Secs. 2613, 2615 and 2619 of the Code of 1860, when an action is brought in equity when it should have been brought at law, or *vice versa*, it may be transferred to the proper docket upon motion made before or at the filing of his answer by defendant; but if the motion is not made at such last mentioned time, the defect or irregularity in the proceeding is waived, pp. 489, 490.

Reaffirmed in Corbin v. Woodbine, 33 Iowa 302; Graham v. Rooney, 42 Iowa 572.

Reaffirmed in Niemand v. Seeman, 136 Iowa 718, 114 N. W. 50, under Secs. 3432, 3437 of the Code of 1897.

Reaffirmed and extended in Graham v. Rooney, 42 Iowa 572; Blough v. Van Hoorebeke, 48 Iowa 42; Balch v. Ashton & Co., 54 Iowa 125, 6 N. W. 147; Taylor & Co. v. Kier, 54 Iowa 646, 7 N. W. 120; Fritzler v. Robinson, 70 Iowa 302, 31 N. W. 62, holding that a case which is tried below as a chancery action will be so tried upon appeal to the Supreme Court.

Cross reference. See further on this question, annotations under Rules 1-3 of Byers v. Rodabaugh (17 Iowa 53), Vol. II, p. 491; Rule 1 of Conygham v. Smith (16 Iowa 471), Vol. II, p. 458.

5. Practice—Law Action on Equity Docket—Failure to Move to Transfer—Waiver of Jury Trial.—When an action is improperly brought in equity when it should have been brought at law, and the defendant fails to move to transfer the action before or at the time of filing his answer as set out in Rule 4 hereof, he thereby waives his right to insist upon a jury trial, p. 491.

Reaffirmed in Gibbs Bros. v. Conrod, 54 Iowa 737, 738, 7 N. W. 147.

6. Contracts—Indivisible Contracts—Successive Actions for Breaches of.—Where the terms and conditions of a contract are indivisible and the contract is to continue for a certain period, successive actions for damages for successive breaches may be maintained—under Sec. 4127 of the Code of 1860, p. 496.

Reaffirmed in Richmond & Jackson v. D. & S. C. R. R. Co., 40 Iowa 269.

Reaffirmed in McCoy v. McDowell, 80 Iowa 148, 45 N. W. 731, under Sec. 2524 of the Code of 1873.

Distinguished in Russell & Co. v. Polk County Abstract Co., 87 Iowa 244, 245, 43 Am. St. Rep. 381, 54 N. W. 215, holding that after recovery of damages in an action for breach of contract, the plaintiff

cannot later sue for new or additional damages caused by the same breach of contract: That the rule of the text applies only where there is a continuing one and there are separate breaches thereof with damages resulting from each.

7. Contracts—When Contract Indivisible.—When by a contract the rights and obligations of the parties thereto depend upon and are to be determined by it as a whole, the contract is indivisible, p. 495.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under *Dibol & Plank v. Minott* (9 Iowa 403), Vol. I, p. 596.

8. Railroads—Contract with Grain Elevator—Validity—Contracts against Public Policy.—A contract by a railroad company with an elevator company to allow the latter to handle "all through grain" is valid. Such a contract is not against public policy because of the Act of Congress of June 15, 1866, authorizing railroad companies "to connect with roads of other states, so as to form continuous lines for transportation" or because of Congressional Acts allowing the erection of bridges across the Mississippi River, pp. 498-500.

Reaffirmed in *Richmond and Jackson v. D. & S. C. R. R. Co.*, 40 Iowa 274, 275.

9. Contracts—Contract by Elevator Company to Store Grain for Railroad Company—Breach by Latter and Measure of Damages to Former—Prospective or Speculative Profits.—In an action by an elevator company against a railroad company for breach of contract by the latter in failing and refusing to allow the plaintiff (elevator company) to handle and store "all through grain" at the rate of one cent per bushel for handling and one cent per bushel for storing it for ten days or fraction thereof after the first ten days it is stored, as provided by contract, the plaintiff may recover as part of the damages, the amount the proof shows it lost from the profits in not being allowed to store the grain, as well as the loss of profits in not being allowed to handle it. Such damages when the proof shows the quantity of grain the plaintiff was deprived of handling and storing, are not speculative, pp. 501, 502.

Reaffirmed in *Richmond and Jackson v. D. & S. C. R. R. Co.*, 40 Iowa 272, 273.

Reaffirmed and extended in *Hichhorn, Mack & Co. v. Bradley*, 117 Iowa 141-143, 90 N. W. 595, holding further that where future profits are in contemplation of the parties, and there is no other basis on which damages for breach of contract can be estimated, such profits may be made the basis for the recovery of damages.

Reaffirmed and varied in *Iowa Brick Mfg. Co. v. Herrick*, 126 Iowa 724, 102 N. W. 789, holding that where one buys goods to be used for specified purposes and they cannot be procured on the market, he may recover of the seller the reasonable profits lost by breach of

the contract or the failure of the seller to deliver the goods as provided by the contract.

Distinguished in *Howe Machine Co. v. Bryson*, 44 Iowa 165, (cited in dissenting opinion 168, 171), 24 Am. Rep. 735, holding that in an action for damages by reason of a sewing machine agent failing to furnish plaintiff with all the machines he could sell at twenty-five per cent. below the retail cost, the measure of damages is the value of the plaintiff's time lost by reason of the defendant's breach of contract, and his necessary expenses and expenditures while he was pursuing the contract before defendant's breach thereof.

Cross reference. See further in this connection, annotations under Rule 2 of *Boies & Barrett v. Vincent* (24 Iowa 387), ante. p. 203.

10. Contracts—Breach of—Action for—Damages, Interest May be Allowed as Part of.—In an action for damages for breach of contract, interest on the amount shown to have been lost by plaintiff, may be allowed as an element of damage under the rule which permits its allowance in order to arrive at the sum which will be just and lawful compensation for the injury sustained, p. 502.

Reaffirmed and explained in *Black v. Minn. & St. L. R. R. Co.*, 122 Iowa 37, 96 N. W. 986, holding that in estimating even unliquidated damages, the jury may take into account interest on the sum found necessary to compensate the plaintiff for the injury suffered at the time of the loss, on the theory that such interest is a part of his damage.

Reaffirmed and qualified in *Jacobson v. United States Gypsum Co.*, 150 Iowa 339, 130 N. W. 125, holding that where in an action for damages the proof shows that the loss or injury by or to the plaintiff was complete at a particular time, the jury may include interest from such time as part of the damages; and it is proper in such a case to so instruct the jury; but where in an action for damages the proof shows plaintiff's damages to be continuing or incomplete, the jury cannot allow interest as a part of the damages from any given date.

Reaffirmed and extended in *Cobb, Blasdel & Co. v. I. C. R. R. Co.*, 38 Iowa 629, holding that in an action against a railroad company for failure to transport and deliver grain, it is proper for the court to instruct the jury that interest on the sums lost by plaintiff and recoverable by him, may be included in the verdict as an element of damages.

Cited in *Christie v. Iowa Life Ins. Co.*, 111 Iowa 182, 82 N. W. 501, the court holding that in an action for money due under a contract, plaintiff is entitled to interest thereon from the time it became due and should have been paid as provided by the contract.

Cross reference. See further on this question, annotations under Rule 3 of *Mote v. Ch. & N. W. R. R. Co.* (27 Iowa 22), ante. p. 368.

BRAYLEY v. ROSS, ADM'R, 33 IOWA 505

1. Decedent's Estate—Limitation on Filing Claim—Exception—Equitable Circumstances.—Under Sec. 2405 of the Code of 1860, a claim against the estate of a decedent is barred, if it is not filed within a year and a half after notice is given of the appointment of an administrator, unless the claim is in an action pending thereon, or there are equitable circumstances entitling the creditor (claimant) to relief. But where the attorney of a non-resident creditor of decedent notifies the administrator within such year and a half of a claim evidenced by a joint note of decedent and another, and the administrator answers by letter stating that his decedent is only surety on the note, that the principal (other maker) is absent from home, but that he (the administrator) will see him upon his return and see that the note is paid; and the administrator further requests, in such letter, that no action be brought, these facts constitute equitable circumstances entitling the creditor to relief after the expiration of the statutory period, pp. 506, 507.

Reaffirmed and explained in Burroughs v. McLain, Adm'r, 37 Iowa 191, holding that when an administrator promises to pay a note of his decedent, and represents to the holder that it is unnecessary to file and prove it, upon which the holder relies, that these facts constitute equitable circumstances entitling the holder to relief after the expiration of the statutory period allowed for filing as set out in the text.

Reaffirmed and explained in Baldwin v. Dougherty, 39 Iowa 55, holding that where a non-resident creditor of a decedent sends the claim insufficiently proven to the administrator within the statutory period, and the administrator thereupon writes letters to the creditor calculated to lead him to believe that no further proof will be necessary, such facts constitute the equitable circumstances as set out in the text; especially where the claim is just and the estate is unsettled at the time it is sought to be enforced.

Reaffirmed and explained in Pettus v. Farrell, 59 Iowa 297, 298, 13 N. W. 319, holding that where an attorney of a creditor of decedent is induced by the attorney for the administrator to delay filing the claim under promises of the latter that he would see the administrator with a view to an adjustment, whereby the claim is filed within the year provided by Sec. 2421 of the Code of 1873 (corresponding to the section of the text), but not in time to be proved within such time, such facts constitute equitable circumstances as set out in the text, the delay mentioned being only for a short time, and the estate being solvent and unsettled at the time the claim is sought to be proven and enforced after such statutory period.

Reaffirmed and explained in Ury v. Bush, Ex'x, 85 Iowa 703, 52 N. W. 667, holding that where a creditor (who is a non-resident) properly proved his claim against a decedent, within the statutory

period, and left it with the attorneys of the personal representative, being assured that it would be paid, that this excuses his failure to present within the statutory period: Where he presents it before final settlement and the estate is solvent and no prejudice results to the personal representative or others interested by the delay—the court saying: “Each case of this kind must be determined according to its own facts.”

Cross reference. See further on this question, annotations under *Brewster v. Kendrick*, Adm’x (17 Iowa 479), Vol. II, p. 558.

HAYNES v. HARRIS, 33 IOWA 516

1. Decedent’s Estate—Administrator Takes Personal Estate—Right to Maintain Action Concerning or Involving.—The administrator of a decedent takes the personal estate, and he *alone* has the right to maintain an action concerning or involving it. The heirs of decedent only have an interest in the personalty left after the administrator settles all debts and liabilities of his decedent. The failure to appoint or delay in appointing an administrator, does not change the rule.

But the court is of the opinion, although not expressly so deciding, that when there are no debts of the decedent, and, on account of lapse of the statutory time, an administrator cannot be appointed, the title of the heirs in the personal estate of decedent becomes absolute, and they may maintain action concerning or involving it, pp. 518-520.

Reaffirmed and explained in *Baird v. Brooks*, 65 Iowa 41, 42, 21 N. W. 164, holding—as does the present case—that no action can be maintained on a promissory note belonging to a decedent’s estate by his heirs, before the expiration of the period allowed by statute for the appointment of an administrator.

Reaffirmed and explained in *Ritchie v. Barnes*, 114 Iowa 68, 86 N. W. 49, holding that until the expiration of the statutory period allowed for the appointment of an administrator, the right to the possession and control of the personal property of the estate of a decedent, is in the administrator appointed or to be appointed, and the heirs cannot sue concerning it.

Reaffirmed and qualified as to first paragraph in *Phinny v. Warren*, 52 Iowa 333, 334, 1 N. W. 523, holding that where the statutory period allowed for the appointment of an administrator has expired, an action on a note belonging to the estate of a decedent, may be maintained by his heirs.

Reaffirmed and qualified as to first paragraph in *Murphy v. Murphy*, 80 Iowa 742, 45 N. W. 915, holding that when the time allowed for the appointment of an administrator as provided by Sec. 2367 of the Code of 1873, has expired, the heirs of a decedent may maintain

action concerning or involving the personal estate of their decedent: That upon the expiration of such statutory period where there are no creditors of the estate, the heirs become the absolute owners of the personalty thereof.

Reaffirmed, explained and varied in Stahl v. Brown, Adm'r, 72 Iowa 722, 723, 32 N. W. 106, holding that the heirs take no title to or ownership of the personal property of the estate of a decedent while it is subject to administration; but it descends to the administrator upon his appointment; and hence holding that an administrator is not bound by any action, agreement or transaction by the heirs of a decedent with a creditor of the estate respecting a claim against it, done or made before the appointment of the administrator.

Reaffirmed, explained and extended in Blackman, Adm'x, v. Baxter, Reed & Co., 125 Iowa 120, 121, 127, 2 Am. & Eng. Ann. Cas., 707, 70 L. R. A. 250, 100 N. W. 76, holding that the personal estate of a decedent and the interest of heirs therein are burdened by the claims of creditors, and until these have been discharged they are not entitled to either distribution or control over it: And holding therefore that an administrator may sue to set aside a conveyance as in fraud of decedent's creditors.

Cited with approval as to second paragraph in Cummings v. Lynn, Adm'x, 121 Iowa 345, 96 N. W. 858, the case construing Sec. 3305 of the Code of 1897, limiting the time in which an administrator may be appointed.

Distinguished in Cassady v. Grimmelman, 108 Iowa 698-700, 77 N. W. 1069, holding that under Sec. 3731 of McClain's Code (Sec. 3313 of the Code of 1897) damages recovered by an administrator for death of his decedent caused by wrongful act or negligence, goes to the "husband, wife, child or parent" surviving and is not subject to the satisfaction of the debts of the decedent, but is subject to the satisfaction of the debts of the person to whom it belongs under such section.

Distinguished in Douglas, Adm'r, v. Albrecht, 130 Iowa 135, 136, 106 N. W. 356, holding that when there are no creditors of a decedent, and the heirs who are adults agree to a settlement and distribution of his estate in a specified manner, an administrator of the decedent who is thereafter appointed cannot demand the surrender to him of the items of personal estate so distributed, and, upon refusal to comply with such demand, maintain an action for conversion thereof: That in such case the agreement of settlement and distribution avoids the necessity for the appointment of an administrator.

Distinguished in In re Estate of Acken, 144 Iowa 530-535, 1912 A., Am. & Eng. Ann. Cas., 1166, 123 N. W. 191, holding that a person may be examined under oath, under Sec. 3315 of the Code of 1897, upon motion of an administrator for the purpose of obtaining possession by him of personal property belonging to his decedent al-

though the proceeding involves the validity of a transfer thereof by decedent or by an attorney of decedent made by the latter to himself, and although there be no debts of the decedent.

Unreported citation, 3 N. W. 158.

Cross references. See further on this question, annotations under Cooley, Adm'r, v. Brown (30 Iowa 470), ante. p. 625; Moore, Ex'r, v. Gordon, Ex'r (24 Iowa 158), ante. p. 156.

McCrary, SURVIVING PARTNER v. RUDDICK, 33 IOWA 521

1. Contracts to Render Services or Labor—Implied Contract for, When Arises—Attorney and Client.—Where one has full knowledge that another is rendering valuable services for him and makes no objection to the performance thereof, and accepts or receives benefits therefrom, the law implies a promise on the part of the former to pay the usual and reasonable price for such services. And this is the rule although the party for whom the services are rendered had a special contract with a third party therefor, unless the party rendering the services had knowledge of such contract.

So where a client has knowledge that attorneys are performing legal services in defending an action for him, and makes no objection thereto and accepts or receives the benefits thereof, he is liable to the attorneys for the usual and reasonable price of the services, although he had a special contract therefor with a third attorney, when the attorney rendering them had no knowledge of the special contract, pp. 523, 524.

Reaffirmed in Hudspeth v. Yetzer, 78 Iowa 12, 13, 42 N. W. 530; Dorr v. Dudley & Coffin, 135 Iowa 22, 112 N. W. 204.

Reaffirmed as to first paragraph in Shelton v. Johnson, 40 Iowa 86, 87; Krouse v. Seiffert & Weise Lumber Co., 108 Iowa 356, 357, 79 N. W. 119.

Distinguished and narrowed in Ennis v. Hultz, 46 Iowa 78-80, holding that where an attorney who is employed to prosecute an action procures another one to render the services therein and informs the client that he "has taken the latter into the case," the attorney so rendering the services cannot recover therefor upon an implied contract in the absence of actual knowledge on the part of the client that he is looking to him therefor at the time the services are rendered.

STATE v. FOSTER, 33 IOWA 525

1. Criminal Law—Former Jeopardy.—A conviction or acquittal, in order to be a bar to another prosecution, must be for the same offense, or for an offense of a higher degree, and necessarily including the offense for which the accused stands indicted.

So a conviction for a simple assault and battery is not a bar to a subsequent prosecution for an assault with intent to do great bodily injury, p. 526.

Reaffirmed and extended as to first paragraph in State v. Blodgett, 143 Iowa 584, 585, 589, 21 Am. & Eng. Ann. Cas., 231, 121 N. W. 689, holding further that a conviction for uttering a forged instrument, is not a bar to a subsequent indictment for the forgery thereof.

Cited in Carter v. Barlow, 105 Iowa 81, 74 N. W. 746, not in point, but upon analogy.

Distinguished in State v. Murray, 55 Iowa 531, 532, 8 N. W. 350, the court holding that a conviction for petit larceny before a justice of the peace, is a bar to a subsequent indictment for grand larceny of the same property.

Distinguished in State v. Gleason, 56 Iowa 205, 206, 9 N. W. 127, holding that a conviction before a justice of the peace for petit larceny, bars a subsequent indictment for *larceny from the person* of the same property.

STATE v. STANLEY, 33 IOWA 526

1. Murder in the First Degree—Indictment for—Sufficiency of Allegations.—Under Sec. 4192 of the Code of 1860, an indictment for murder in the first degree where the deceased was not killed by means of poison, or by accused lying in wait, or in the perpetration or attempt to perpetrate arson, rape, robbery, mayhem or burglary, must charge that the killing was done with malice aforethought and wilfully, deliberately and premeditately; that is the indictment must allege an intent to kill by accused, and that the killing was so done, and with malice aforethought, willfully, deliberately and premeditately. But an indictment charging that the assault by accused was so done from the result of which the assaulted person died, sufficiently charges that the accused so killed him, pp. 529, 530.

Reaffirmed in State v. Shelton, 64 Iowa 337, 20 N. W. 462; State v. Wood, 112 Iowa 413, 84 N. W. 521; State v. Gray, 116 Iowa 236, 89 N. W. 989; State v. Linhoff, 121 Iowa 633-635, 97 N. W. 78; State v. Dyer, 147 Iowa 219, 124 N. W. 630; State v. Rankin, 150 Iowa 704-706, 130 N. W. 734, some of these cases holding that when an indictment is not good as charging murder in the first degree, it is nevertheless good for murder in the second degree, and accused may be tried for the latter degree thereunder.

Cross reference. See further on this question, annotations under State v. McCormick (27 Iowa 402), ante. 416.

2. Homicide—Self Defense—Accused Bringing on Difficulty—When Plea of Self Defense Not Available.—Upon the trial of an indictment for murder where the proof shows that accused brought on the difficulty, he cannot avail himself of the plea of self defense un-

less he proves that he in good faith withdrew or endeavored to withdraw therefrom before he killed his adversary, p. 532.

Reaffirmed in State v. Portpilo, 139 Iowa 478, 116 N. W. 1051.

Cross references. See further on this question, annotations under Rule 3 of State v. Neely (20 Iowa 108), Vol. II, p. 786.

3. Criminal Law—Indictment—Indorsement of Names of Witnesses on—Initials of Christian Names of Witnesses in Such Indorsement—Effect.—The indorsement on an indictment of the initials of the Christian names and the surname of a witness, is sufficient to authorize his introduction upon the trial of the indictment, p. 533.

Reaffirmed and explained in State v. Arnold, 98 Iowa 256, 257, 67 N. W. 253, holding that the mere misnomer in respect to the Christian name of a witness indorsed on an indictment will not prevent the State introducing him as a witness, when his identity sufficiently appears from the facts, and it does not appear that the accused was thereby misled to his prejudice.

Reaffirmed and explained in State v. Dale, 109 Iowa 99, 100, 80 N. W. 209, holding that the variance between the name of the witness on the indictment and the one called must be such as to mislead or prejudice the defendant.

Reaffirmed and extended in State v. Anderson, 125 Iowa 503, 504, 101 N. W. 202, holding further that an error in the name of a witness indorsed on the indictment, or in the notice provided by Sec. 5373 of the Code of 1897 where he was not before the grand jury, will not prevent his being introduced as a witness, unless it appears that accused was thereby misled or prejudiced.

Cited in State v. Van Auken, 98 Iowa 679, 68 N. W. 456, not in point.

Cross reference. See further on this question, annotations under State v. McComb (18 Iowa 43), Vol. II, p. 581.

SIMEON v. MERRITT, 33 IOWA 537

1. Negotiable Promissory Note—Indorsement before Maturity—Action by Second Indorsee—Fraud as a Defense, When Not Available.—Where one takes a negotiable note before maturity, in good faith and for a valuable consideration and without notice of fraud of the payee in procuring the maker to execute it, and thereafter such indorsee or holder transfers or indorses it to another who has knowledge of such fraud, the last indorsee or transferee may recover of the maker thereon, and such fraud is not available as a defense in an action by the last indorsee or transferee against the maker, p. 539.

Reaffirmed in Moonyer v. Cooper, 35 Iowa 260.

Cross reference. See further on this question, annotations under Peabody v. Rees (18 Iowa 571), Vol. II, p. 682.

1. Tax Sale of Land—Part of Taxes Legal and Part Illegal.—Where land is sold for taxes, part of which are legal and part illegal, the sale and deed made thereunder are valid, p. 541.

Reaffirmed in Talman v. Cook, 43 Iowa 332.

Cross reference. See further on this question, annotations under Rule 4 of Eldredge v. Kuehl (27 Iowa 160), ante. p. 381.

2. Tax Sale of Land—Tax Warrant Not Necessary.—A valid sale of land for taxes may—under Secs. 751, 756, 763-765 of the Code of 1860—be made by the county treasurer, although a tax warrant be not issued by the clerk of the county board of supervisors, p. 541.

Special cross reference. For cases citing and sustaining the text, and many others, see annotations under Rule 3 of Parker v. Sexton & Son (29 Iowa 421), ante. p. 543.

WOODWARD v. WILLARD, 33 IOWA 542

1. Foreign Judgment—Action on in This State—Unauthorized Appearance in Foreign Action—When No Defense to Action Here.—In an action in a court of this state on a foreign judgment the fact that the appearance of defendant was entered in the foreign action by attorneys without authority therefor, does not affect the validity of the judgment and is no defense to the action thereon in this State, when it is sufficiently shown that the defendant was duly served with summons, and would be concluded by the judgment, even in the absence of any appearance, p. 548.

Reaffirmed in Tomlin v. Woods, 125 Iowa 375, 376, 101 N. W. 138.

GORDON v. HARDIN, 33 IOWA 550

1. Executions—Levy and Sale of Mortgaged Personal Property under Execution against Mortgagor.—The laws of this State gives a mortgagee of personal property the right to the possession, both before and after forfeiture, subject to the performance of the conditions of the mortgage. Such property cannot be levied upon and sold under an execution in favor of the mortgagor's (debtor's) judgment creditor, p. 551.

Reaffirmed in Vanslyck v. Mills & Co., 34 Iowa 380; Cummings v. Tovey, 39 Iowa 197; McConnell v. Denham, 72 Iowa 497, 34 N. W. 299.

Reaffirmed and extended in Porter et al, Adm'rs, v. Knight, 63 Iowa 369, 19 N. W. 284; Wells & Co. v. Sabelowitz, 68 Iowa 240, 241, 26 N. W. 128, holding that mortgaged personalty is not subject to levy under an attachment against the mortgagor (debtor).

Reaffirmed and varied in Warder-Bushnell & Glessner Co. v. Harris, 81 Iowa 154, 46 N. W. 859, holding that a mortgagee of chat-

RHODES v. SEXTON & SON, 33 IOWA 540

1. Tax Sale of Land—Part of Taxes Legal and Part Illegal.—Where land is sold for taxes, part of which are legal and part illegal, the sale and deed made thereunder are valid, p. 541.

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Reaffirmed and varied in Warder-Bushnell & Glessner Co. v. Harris, 81 Iowa 154, 46 N. W. 859, holding that a mortgagee of chat-

tels may sue another for the conversion thereof, although the latter converts them claiming under an inferior lien or mortgage.

Cited in Evans v. St. Paul Harvester Works, 63 Iowa 209, (dissenting opinion) 18 N. W. 883, the majority court holding that a mortgagor of exempt personal property may maintain an action for damages by reason of its wrongful seizure and sale under execution.

Cited in Hollingsworth v. Holbrook, 80 Iowa 154, 20 Am. St. Rep. 411, 45 N. W. 562, not in point, but upon analogy.

Cited in Baker v. Mills, sheriff, 108 Iowa 491, 79 N. W. 269, not in point.

Cited in Collins v. Gregg, 109 Iowa 509, 80 N. W. 563, construing Chap. 117, Acts of 1886 (21st General Assembly).

Distinguished in Buck-Reiner Co. v. Behety, 82 Iowa 355, 48 N. W. 97, holding that where G., a creditor of a mortgagor of personalty, institutes garnishment proceedings against the mortgagee to subject the surplus of proceeds of the mortgaged property after the payment of the mortgage debt, and thereafter another creditor of the mortgagor issues attachment proceedings and levies on the property as provided by Chap. 117, Act of Twenty-first General Assembly, (Acts of 1886), that the levying of the attachment does not discharge the garnishee (mortgagee), and G. has the superior right over such subsequent attachment creditor.

Distinguished in Citizens' State Bank v. Council Bluffs Fuel Co., 89 Iowa 622-624, 57 N. W. 445, holding that although Chap. 117, Acts of 1886 (21st General Assembly), allows a creditor to levy on personally mortgaged, by attachment or execution, by performing the conditions therein laid down, still, this does not prevent such a creditor from contesting the validity of a chattel mortgage alleged to be fraudulent, by garnishment proceedings against the agent of the mortgagee.

Cross references. See further on this question, annotations under Rule 1 of Doane & Co. v. Garretson (24 Iowa 351), ante. p. 195; Torbert v. Hayden, sheriff (11 Iowa 435), Vol. I, p. 839; Campbell v. Leonard (11 Iowa 489), Vol. I, p. 848.

*STATE v. FARR, 33 IOWA 553

1. **Criminal Law—Who Are Principals.**—Sec. 4668 of the Code of 1860 abolishes the distinction between principals and accessories before the fact, and thereunder all persons aiding, abetting or participating in the commission of a crime are equally guilty as principals.

But the mere presence of a person at the time a crime is committed by another and without his assisting or participating in its

* Note.—The case of State v. McCormack, 56 Iowa 586, 9 N. W. 916, 917, cites this case on a point neither decided nor touched on in the opinion hereof.—Ed.

commission, will not, in the absence of proof of conspiracy, render him guilty as a principal, pp. 560-562.

Reaffirmed as to first paragraph in State v. Maloy, 44 Iowa 113, 114.

Reaffirmed and explained as to second paragraph in State v. Bartlett, 128 Iowa 520, 105 N. W. 60, holding that something more than knowledge that a crime is contemplated, and more even than a mere personal presence at the time and place where a crime is committed, must be shown in order to charge one with complicity in its commission.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

MARQUETTE v. CHICAGO & NORTHWESTERN R. R. Co., 33 IOWA 562

I. Trial—Evidence Conflicting—Instructions—Question for Jury—Province of Court and Jury.—Upon the trial of an action by jury, when the evidence is conflicting, it is the province of the jury to determine the weight and sufficiency of the evidence; and it is, in such case, the province of the court to instruct the jury on the law applicable to the case, pp. 566, 570.

Reaffirmed in Willoughby v. Ch. & N. W. R. R. Co., 37 Iowa 435.

MCCLELLAND v. JAMES, 33 IOWA 571

I. Written Contracts—Parol Evidence to Explain, etc., Inadmissible—For What Parol Evidence Admissible—Intention of Parties.—Parol evidence is inadmissible to vary or control a written contract; nor is it admissible to remove a patent ambiguity therein. But parol evidence is admissible to prove the circumstances under which a written contract was executed for the purpose of arriving at the intention of the parties, when such intention does not clearly appear on the face of the instrument, p. 577.

Special cross reference. For cases citing and sustaining the text and many others, see annotations under *Atherton v. Dearmond* (33 Iowa 353), ante. p. 824.

SHAFFER v. SUNDWALL, 33 IOWA 579

I. Attachment—Amendment of Petition or Affidavit—Writ of Attachment without Seal Affixed, Validity.—Under Sec. 3242 of Code of 1860, the attachment law shall be liberally construed, and the plaintiff, before or during trial, shall be permitted to amend any defect of form in the affidavit, bond, attachment, or other proceeding. So it is proper to allow the plaintiff in an attachment action to amend a defect in the form of his verification to the petition or affidavit for the attachment.

But a writ of attachment without the seal of the court from which it issues affixed thereto, is of no validity, and the defect is of such a nature that it cannot be cured by amendment by subsequently attaching the seal thereto, pp. 582, 583.

Overruled as to second paragraph in Murdough v. McPherrin, 49 Iowa 479, 480, holding that, under 3021 of the Code of 1873, the defect by the failure to affix the proper seal to a writ of attachment, may be cured by subsequently affixing it.

Reaffirmed and extended as to first paragraph in Magoon v. Gillett, 54 Iowa 54-56, 6 N. W. 132, holding that under Sec. 3021 of the Code of 1873, it is proper for the court in an action not based on a written contract and pending a motion to quash an attachment and discharge the property attached, to enter an order that the plaintiff be allowed to hold the property attached and be allowed to attach property in all not exceeding a certain amount fixed in the order: And such order cures a failure to make an allowance of the amount in value of the property that may be attached, as required by Sec. 2955 of the Code of 1873.

STEWART v. BISHOP, 33 IOWA 584

1. Husband and Wife—When Wife's Personal Property under Control of or in Possession of Husband Is Liable for His Debts.—Under Sec. 2502 of the Code of 1860, a wife's personal property in possession of or under control of her husband is not subject to the satisfaction of her husband's debt contracted before he took possession or control thereof, if she files the notice of her ownership provided by such section before it is levied upon for such a debt of her husband; but such property is subject to the satisfaction of a debt of her husband contracted after the property is in the possession of or under the control of the husband and before the wife files such statutory notice of her ownership, pp. 585, 586.

Distinguished in Crouse v. Morse, 49 Iowa 386, holding that the statute of the text has no application to real estate of the wife in possession of or under the control of her husband.

Distinguished and narrowed in Patterson v. Spearman, Clark and Seeley, 37 Iowa 40, 42, holding that under Sec. 2505 of the Code of 1860 as amended by Chap. 126, Laws of 1870, the wife's personalty in the possession of the husband is not subject to the satisfaction of his debt created before marriage, although she does not file the statutory notice.

Cross reference. See further on this question, annotations under Smith v. Hewitt (13 Iowa 94), Vol. II, p. 123.

MEREDITH v. CALLANAN, 33 IOWA 590

(Abstract.)

1. Estoppel in Pais.—Where a grantee receives and records a deed to land with a full knowledge of the terms of a contract under which the deed is delivered, he is thereby estopped from denying his liability under such contract, p. 591.

Cited in Grumme v. Firmenich Mfg. Co., 110 Iowa 506, 507, 81 N. W. 791, the court holding that where a creditor is informed that a company that owes him has executed a mortgage giving priority to another creditor, but including his debt therein, and approves of the entire transaction, he cannot thereafter attack the validity thereof.

WILSON v. BURLINGTON & MISSOURI RIVER R. R. Co., 33 IOWA 591

(Abstract.)

1. Railroads—Negligence in Operating Trains—Evidence of—Action for Killing Stock in a City.—In an action against a railroad company for negligence in operating its trains in a city whereby plaintiff's horse was killed, the facts that the train was running at an unusual rate of speed, that no alarm or signals were given, and no effort was made to check the train to avoid killing the animal, are admissible in evidence to prove negligence, p. 592.

Reaffirmed and explained in Artz v. C. R. I. & P. R. R. Co., 44 Iowa 285, holding that while a railway is not restricted by law to any rate of speed, unusual speed at crossings, or at other places where men or brutes may be exposed to danger from passing trains, may be considered in connection with other matters, as the failure to give signals of the approach of the train, and the like, to determine the want of care on the part of those operating it.

GILBERT, HEDGE & Co. v. WILCOX, 33 IOWA 594

(Abstract.)

1. Practice—Default—Setting Aside—Discretion of Trial Court—Abuse—Reversal.—In acting upon a motion to set aside a default the trial court has a large judicial discretion, and his ruling thereon will not be reversed upon appeal, except in case of a clear abuse of such discretion, or where some legal requirement has been disregarded, p. 594.

Reaffirmed in Callanan v. Ætna Nat'l Bank of Hartford, 84 Iowa 11, 50 N. W. 70.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

STATE *v.* METCALF, 33 IOWA 610

1. Constitutional Law—Legislative Power—Law Dependent on Vote of People—Intoxicating Liquors.—The General Assembly cannot pass a law which shall be dependent for its force and validity upon a vote of the people. The people cannot make laws in their primary individual capacity, but must do so by representatives.

So Chap. 82 Acts of 1870 (13th General Assembly) providing for making the sale of intoxicating liquors unlawful by a vote of the county, is unconstitutional, p. 610.

Special cross reference. For cases citing the text, and others distinguishing it, see annotations under State *v.* Weir (33 Iowa 134), ante. p. 794.

Annotations to Decisions Reported in Volume 34 Iowa.

YOST *v.* LEONARD, 34 IOWA 9

1. **Municipal Corporations—Dedication of Land to Public—Effect of Acknowledging and Recording Plat—Injunction by Lot Owners.**—Where the owner of land lays it out into lots, streets and public squares or places as part of a city, and acknowledges and records the plat thereof pursuant to the provisions of Chap. 50 of the Code of 1860 (Chap. 41 of the Code of 1851), the fee simple title to the streets, squares, etc., vests in the city for the use of the public. And injunction lies to restrain the vacation or obstruction of such a street, etc., by the dedicator upon complaint of the owner of a lot adjoining thereon, who purchased with reference to the plat, pp. 15, 18.

Distinguished in Williams *v.* Carey, Mayor, 73 Iowa 196, 197, 34 N. W. 814, holding that injunction will not lie in favor of an abutting lot owner against a city to prevent it from vacating twelve feet of street, where the street so vacated or narrowed is forty-one feet wide, and no material damage is shown as resulting to such abutting lot owner.

Distinguished in McLachlan *v.* Town of Gray, 105 Iowa 260-264, 74 N. W. 774, holding that in the absence of fraud or bad faith, injunction does not lie in favor of an abutting lot owner to restrain a city from vacating a part of a highway within its limits; that in such case the lot owner's remedy is by *Certiorari*.

Cross references. See further on this question, annotations under Cook *v.* City of Burlington (30 Iowa 94), ante. p. 574; Gray *v.* Iowa Land Co. (26 Iowa 387), ante. p. 344; Warren *v.* Mayor of Lyons City (22 Iowa 351), ante. p. 39; City of Dubuque *v.* Maloney (9 Iowa 450), Vol. I, p. 606.

KOESTER *v.* CITY OF OTTUMWA, 34 IOWA 41

1. **Municipal Corporations—Liability of City for Personal Injuries Resulting from Excavation in Sidewalk—Negligence.**—A city is bound to use ordinary care and prudence to see that an excavation in a sidewalk is securely barricaded, failing which it is liable in damages for personal injuries to a traveler received by falling into it, p. 43.

Cited in Weirs v. Jones County, 80 Iowa 354, 45 N. W. 883, the court holding that a county must exercise, in the building, maintaining and keeping county bridges, such care as reasonably prudent and careful men would use in the conduct and management of their own affairs of like importance—failing which it is liable for injuries to a person occasioned thereby; and holding that where a county places a barricade or obstruction to a bridge which is defective or out of repair, and it is afterwards removed, it is not liable for personal injuries thereafter occurring, unless it has notice of the removal thereof, or, in the exercise of reasonable diligence, should have known it in time to have prevented the accident; that the liability of a county in such cases is analogous to that of a city in respect to its streets and sidewalks.

Cited in Gould v. Schermer, 101 Iowa 588, 70 N. W. 699, the court holding that a road supervisor is liable in damages for personal injuries resulting from defects in or manner of construction of a bridge erected by him, when he failed to exercise the care in its construction which an ordinarily prudent man under similar circumstances would have exercised; and that in such case, the question of whether or not the construction of the bridge without railings or barriers in view of its situation and the use to which it was put, was negligence, is one of fact for the jury to determine.

2. New Trial—Misconduct of Juror as Ground for—What Not Sufficient.—The fact that one of the jurors took dinner and supper with one of the successful party's attorneys during the progress of the trial, is not ground for a new trial, when it is shown that it was done upon an invitation previous to the commencement of the trial, that nothing was said by either of them concerning the case, that the unsuccessful part was aware of the fact during the subsequent progress of the trial and made no objection to proceeding with the trial, no prejudice to the unsuccessful party is shown to have resulted therefrom, and the verdict is sustained by the evidence, pp. 44, 45.

Cited in Foedisch v. Ch. & N. W. Ry. Co., 100 Iowa 731, 69 N. W. 1057, the court holding that where a party knows of the misconduct of a juror before the conclusion of a trial but fails to call the attention of the court thereto, and proceeds thereafter with the trial without objection, he thereby waives his right to insist upon such misconduct as a ground for a new trial.

Cited in Ayrhart v. Wilhelm, 135 Iowa 296, 112 N. W. 784, the court holding that the facts that jurors and attorneys mingle socially or engage in recreation together during the progress of the trial, but during recesses, when they do so publicly or openly, will not constitute a ground for a new trial.

Distinguished and doubted in Stafford v. City of Oskaloosa, 57 Iowa 752-754, 11 N. W. 670, a case wherein a judgment was reversed

upon appeal because of too intimate association of a juror and the attorney of the successful party during the progress of the trial, although no prejudice to the unsuccessful party was shown to have resulted therefrom—the court saying that the present case “went to the very verge of indulgence to jurors and attorneys.”

CEDAR RAPIDS & MISSOURI RIVER R. R. CO. v. BOONE COUNTY, 34 IOWA 45

1. Written Contracts and Instruments—Parol Evidence Inadmissible to Vary, etc.—Parol evidence of a contemporaneous agreement is inadmissible to change, vary, add to or control a written contract or other instrument, pp. 52, 53.

Reaffirmed and explained in Kelly v. Ch. M. & St. P. Ry. Co., 93 Iowa 444, 445, 61 N. W. 960, holding that when, by the express terms of the written agreement a particular condition is made the consideration for the undertaking, it is no more competent to contradict or vary its terms by parol evidence as to the consideration by which it is supported, than as to its other conditions.

Reaffirmed and explained in Schrimper v. C. M. & St. P. Ry. Co., 115 Iowa 39, 40, 82 N. W. 918, holding that parol evidence of a contemporaneous agreement which is part of the consideration of a deed, cannot be admitted in evidence to vary the effect of the instrument.

(Note.—Neither fraud, accident, mistake or want of consideration, was involved in this case, or its annotated cases.—Ed.)

Cross references. See further on this question, annotations under Atherton v. Dearmond (33 Iowa 353), ante. p. 824; Rule 1 of Gelpecke, Winslow & Co. v. Blake (19 Iowa 263), Vol. II, p. 726.

ALLEN v. CERRO GORDO COUNTY, 34 IOWA 54

(Later Appeal, 40 Iowa 349.)

1. Swamp Lands—Power of County Board of Supervisors to Employ Agents Concerning.—The board of supervisors of a county may contract with a person whereby he is to render all services, prepare all proofs, furnish all agents and counsel, and prosecute its claims for swamp lands, before the department at Washington, D. C., such person to be paid therefor in a portion of the lands, money or scrip recovered, pp. 64-66.

Reaffirmed in Grimes v. Hamilton Co., 37 Iowa 295, 296, 298; Denison v. Crawford County, 48 Iowa 214; Emmet County v. Allen, 76 Iowa 502, 41 N. W. 202.

Reaffirmed and varied in Page County v. Am. Em. Co., 41 Iowa 124-126, holding that the county board of supervisors may dispose of *all* of the swamp lands of the county, to be devoted to the purposes set out in Sec. 986 of the Code of 1873; but that such contract must

—under Sec. 1 of Chap. 77, Acts of 1862 (9th General Assembly) be ratified by a vote of the people.

Cited in Mills Co. v. B. & M. R. R. Co., 47 Iowa 71, the court holding that a county may (by its board of supervisors) compromise an action against it involving the title to swamp land, and dispose by the compromise of *a portion of the land in dispute* for railroad purposes without a vote of the people.

Cited in Waggoner v. Mann, 83 Iowa 22, 48 N. W. 1067; Disbrow v. Supervisors of Cass County, 119 Iowa 39, 93 N. W. 586, not in point, but upon analogy.

Distinguished in Palo Alto County v. Harrison, 68 Iowa 93, 94, 26 N. W. 21, holding that a county board of supervisors cannot dispose of all of the swamp lands of the county by contract, in consideration of the party with whom the contract is made obtaining patents thereto.

Unreported citation, 138 N. W. 456.

2. Practice—Pleading—Demurrer in Equity Action—General Demurrer Specifying Objections to Pleading—Effect.—Under Sec. 2877 of the Code of 1860, a demurrer in an action in equity may be in general terms, i. e. that the pleading does not state facts sufficient to constitute a cause of action or defense; but where such a demurrer specifies the objection to the pleading, none other will be considered, p. 67.

Reaffirmed in Bisson v. Curry, 35 Iowa 80.

Reaffirmed and narrowed in Hanna v. Hawes, 45 Iowa 442, holding that a demurrer in an equitable action may be both general and special.

OTTUMWA LODGE v. LEWIS, 34 IOWA 67, 11 AM. REP. 135

1. Lands—Adjoining Land Owners—Building of More Than One Story—One Party Owner of Lower and Another of Upper, Rights of—Repairs.—Where one party owns the lower and another the upper story of a building, each story thereof is considered a separate building, and the owner of the lower cannot compel the owner of the upper to repair the roof nor make him liable for the cost of such repairs; nor can the owner of the upper story compel the owner of the lower story to repair the foundation to the building or make him liable for such repairs, pp. 69, 70.

Reaffirmed and extended in Jackson v. Burns, 129 Iowa 618, 621-623, 106 N. W. 1, 3 L. R. A. (New Series) 510, holding further that when the walls of the owner of the lower story owned by one party have, in the course of nature, so far decayed that they no longer furnish adequate support to the portion of the building above, which is owned by another person, the former has the right to erect a different structure if he sees fit, and make such use of his prem-

ises as he sees fit, regardless of the license which the other may have had to make use of the support of such walls so long as they were sufficient to furnish support.

STOUT v. FOLGER, 34 IOWA 71, 11 AM. REP. 138

1. Vendor and Purchaser—Purchaser Assuming Indebtedness of Vendor—Right of Action of Vendor, When Arises.—Where, as part of the consideration for the sale of real estate, the purchaser assumes certain indebtedness of the vendor, and agrees to save him harmless therefrom, the vendor may sue the purchaser thereon upon his failure to pay the debts and without first paying them, pp. 74, 75.

Reaffirmed in Lawrence Sav. Bk. v. Stevens, 46 Iowa 432; Lyon v. Aiken, 70 Iowa 18, 29 N. W. 786; Vorse v. Des Moines Marble & Mantel Co., 104 Iowa 546, 73 N. W. 1066.

Reaffirmed and explained in Bacon v. Marshall, 37 Iowa 583, holding that where one for a valuable consideration *assumes and undertakes to pay* a judgment of another, the judgment debtor may sue him on such agreement, without first paying the judgment.

HUNT v. HOOVER, 34 IOWA 77

1. Trial—Evidence—Party Introducing Adverse Party as Witness Cannot Impeach.—Where a party to an action introduces the adverse party as a witness, he cannot thereafter impeach the latter's testimony by showing that he (the adverse party, witness) is unworthy of credit under oath, p. 79.

Reaffirmed in Darr v. Darrow, 120 Iowa 34, 94 N. W. 246.

Distinguished in Hall v. Town of Mason, 99 Iowa 706-708, 34 L. R. A. 207, 68 N. W. 925, holding that although it is true as a general rule, that a party cannot impeach or discredit his own witness, yet where a party introduces a witness and examines him as to certain facts, and thereafter the adverse party introduces him and examines him as to certain other independent questions, the first party may impeach the last testimony by proof of prior contradictory statements—And that this is the rule where such independent questions are elicited upon cross examination.

FRAZIER v. NORTINUS, 34 IOWA 82

1. Fences—Breachy Cattle, Damage Done by—Action for—Evidence Required of Plaintiff.—Where cattle are feeding upon the commons in this State, and break and enter the inclosed field of another, the owner of the close cannot maintain an action of trespass therefor without showing, if controverted, that the fence about the close was such as the statute required, p. 83.

Reaffirmed and qualified in De Mers v. Rohan, 126 Iowa 492, 102 N. W. 415, holding that where there has been no partition of an

unlawful division fence, and the cattle of one land owner enters into the field of the other adjoining owner through or over it, and thence into another field inclosed by a lawful fence, the owner of the cattle is liable for the damages caused by them in and to the lawfully inclosed field.

Cross references. See further on this question, annotations under Herold v. Meyers (20 Iowa 378), Vol. II, p. 830.

DES MOINES COUNTY v. HARKER, 34 IOWA 84

1. Statutes of Limitation Does Not Run against the State—Action by County to Foreclose Mortgage to School Fund.—The statutes of limitation of this State do not run against the State.

Nor do such statutes run against an action by the county to foreclose a mortgage to the school fund; as the county, in this case, acts for the state, pp. 86, 87.

Reaffirmed and explained in Kellogg v. Decatur County, 38 Iowa 526, holding that the statutes of limitation do not apply to actions by a county for the benefit of the school fund.

Reaffirmed and qualified in State v. Henderson, 40 Iowa 244, 245, holding that under Secs. 793, 794, and 3727 of the Code of 1873, the bond of a county treasurer is *to the county and all members thereof intended to be thereby secured*, and not to the state; and that the state cannot maintain an action thereon for state taxes collected and not paid over, after the statute of limitation has barred the county to sue thereon therefor, as provided in the text.

Cited with approval in Bellows v. Todd, 39 Iowa 216, the court holding that the statutes of limitation do not run against the United States Government.

Distinguished in Brown & Sully v. Painter, 44 Iowa 369, holding that the statute of limitation runs against an action by the county for the recovery of taxes; and that this rule applies against an assignee of such taxes.

Cross references. See further on this question, annotations under Rules 2 & 3 of City of Pella v. Scholte (24 Iowa 281), ante. p. 181; and see, also, annotations under State v. Dyer (17 Iowa 223), Vol. II, p. 520.

MERESHON v. NATIONAL INSURANCE CO., 34 IOWA 87

1. Trial—Instructions—General Exceptions to—Review on Appeal.—General exceptions to the instructions or to the charge of the court given to the jury, when some of them or some part thereof are or is correct, will not authorize a review of specific errors therein upon appeal to the Supreme Court, p. 88.

Reaffirmed in Ludwig v. Blackshere, 102 Iowa 371, 71 N. W. 357.

Cross references. See further on this question, annotations under Rule 5 of Dav. Gas L. & Coke Co. v. City of Davenport (13 Iowa 229), Vol. II, p. 140.

2. Practice—Trial—General and Special Verdict—When Special Taken Over General.—To justify a judgment upon a special verdict, contrary to the general verdict, it must affirmatively appear that the latter is inconsistent with the former, p. 90.

Reaffirmed in Close v. Atkins, 39 Iowa 522; Mitchell v. Joyce, 76 Iowa 453, 34 N. W. 455.

Reaffirmed and explained in Cooper v. McKee, 53 Iowa 242, 5 N. W. 124, holding that when under a special verdict the plaintiff has no cause of action, a general verdict in his favor will—under the Code of 1873—be disregarded, and judgment be entered for defendant upon the special verdict.

Reaffirmed and explained in Johnson v. Miller, 82 Iowa 699, 31 Am. St. Rep. 514, 47 N. W. 905, holding that it is only when the special findings of facts are manifestly inconsistent with the general verdict that the special findings should control.

Reaffirmed and explained in Hawley v. City of Atlantic, 92 Iowa 174, 175, 60 N. W. 520, holding that to warrant a judgment upon special findings against a general verdict, the findings must be absolutely inconsistent therewith.

Distinguished in Darling v. West, 51 Iowa 264, 1 N. W. 535, holding that where a jury fails to answer interrogatories submitted for special finding and which are material and necessary to the general verdict, a motion for a new trial on this ground will be sustained.

Cross reference. See further on this question, annotations and cross references under Hardin v. Branner (25 Iowa 364), ante. p. 278.

3. Insurance Companies—Waiver of Condition in Policy as to Forfeiture by Acceptance of Premiums.—Where an insurance company accepts the premium on a policy of insurance, with full knowledge of a breach by insured of a condition in the policy declaring a forfeiture, it thereby waives its right to thereafter claim a forfeiture by reason of the breach, p. 89.

Reaffirmed and extended in Padrnos v. Century Fire Ins. Co., 142 Iowa 206, 119 N. W. 136, holding further that where an insurance company, with full knowledge of a breach of the conditions of a policy rendering it void, retains cash paid by insured and a premium note therefor, and does not offer to return same and pay it back, it is estopped from claiming invalidity by reason thereof.

Cross references. See further on this question, annotations under Viele v. Germania Ins. Co. (26 Iowa 9), ante. p. 298.

4. Insurance Policy—Assignment of, Validity—Right of Assignee to Maintain Action on.—A policy of insurance may—under

Sec. 1798 of the Code of 1860—be assigned or transferred subject to the same defenses, if any, which the insured has against insured; and this is the rule although the Code forbids such assignment; and in such case, the assignee under Sec. 2757 of the Code of 1860—maintain an action in his own name. This rule applies to an assignee of such policy who holds a mortgage on the property insured for the amount of the policy. It also, applies when the insured dies after loss thereunder, p. 91.

Reaffirmed in Bartlett v. Iowa State Ins. Co., 101 W. 579; Fred Miller Brewing Co. v. Capital Ins. Co., 82 Am. St. Rep. 529, 82 N. W. 1025; Jones v. Haas, 94 Am. St. Rep. 286, 90 N. W. 496.

Reaffirmed in Crocker v. Hogin, 103 Iowa 22 under Sec. 3262 of McClain's Code, corresponding to the text.

Cited in Spinney v. Miller, 114 Iowa 212, 89 N. W. 318; Blauk v. Independent Ice Co., 153 W. 346, not in point.

Unreported citation, 134 N. W. 862.

DAVIS v. SHAWHAN, 34 IOWA 91

1. Judgment Lien on Land—Limitation—Effect of Death of Judgment Debtor.—Under Sec. 4109 of the Code of 1860 a judgment is a lien on the lands of the judgment debtor for ten years from the date of its rendition; and it may be extended for such period by the judgment creditor even though the judgment debtor may have died, and without filing the claim against the estate of the decedent (judgment debtor), pp. 93, 94.

Special cross reference. For cases citing and for cases distinguished, and others, see annotations under Rule 2 of Bald (Iowa 66), ante, p. 81.

2. Decedent's Estate—Filing and Proving Claim—Limitation as to—Equitable Circumstances and Effect of Creditor Neglects or Fails to File and Prove his Claim.—If a creditor of a decedent for more than ten years after the death of the decedent, administrator and notice thereof, the fact that a creditor of the estate, whom the last administrator succeeded in paying the claim, does not entitle the claimant to equitable relief under Sec. 2405 of the Code of 1860; and the claim is barred by the limitation because not filed and proved within a year and a day after the appointment of the administrator was given under the Code, in such case, although the estate is still unsettled, the claim is barred.

Cited in Brownell v. Williams, 54 Iowa 354, 6 N. W. 100, involving other facts and circumstances sought to be distinguished.

for equitable relief under Sec. 2421 of the Code of 1873, corresponding to the section of the text, which are held insufficient therefor.

Partially overruled in Mosher v. Goodale et al, Administrators, 129 Iowa 723, 106 N. W. 197, holding that the mere promise of an administrator to pay a claim is not sufficient excuse for delay in filing and serving notice thereof; but that when the promise of the administrator is coupled with a request acted upon by the claimant that the filing of the claim be postponed until after the expiration of the year for filing claims, such a promise might justify the granting of relief after the expiration of the statutory period allowed therefor.

Cross references. See further on this question, annotations under Brewster v. Kendrick, Adm'r, (17 Iowa 479), Vol. II, p. 558.

SMITH v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co., 34 IOWA 96

1. Railroads—Liability for Killing or Injuring Stock.—Under Sec. 6, Chap. 169, Acts of 1862, a railroad company is not liable absolutely for killing or injuring stock by its train at a place where it had a right to fence but has not fenced, when such stock is under the control of the owner; and in order to constitute such liability, such stock, when so killed or injured must be running at large, pp. 97, 99.

Reaffirmed in Morris v. Ch. G. W. Ry. Co., 133 Iowa 29, 110 N. W. 155.

Cross references. See further on this question, annotations under Hinman v. Ch. R. I. & P. R. R. Co. (28 Iowa 491), ante. p. 473.

GARRETY v. BRAZELL, 34 IOWA 100

1. New Trial—Affidavits of Jurors in Support of—When Not Admissible.—Affidavits of jurors will not be received in support of a motion for a new trial to prove that the verdict was not assented to by them, or to prove any other matter inherent in the verdict, p. 104.

Reaffirmed in Hollenbeck & Son v. Garst, 96 Iowa 512, 65 N. W. 418; Baxter, Adm'r, v. City of Cedar Rapids, 103 Iowa 608, 609, 72 N. W. 793.

Reaffirmed and explained in State v. Dudley, 147 Iowa 653, 126 N. W. 815, holding that affidavits of jurors that they have been unduly influenced by their fellow jurors, or of the reasons for assenting to the verdict, or of improper arguments resorted to in the jury room, or that they did not assent to the verdict, or that it was not the result of their deliberate judgment, or that they did not understand the instructions of the court, are incompetent, and cannot be received to impeach the jury's findings.

Cross references. See further on this question, annotations under Wright v. Ill. & Miss. Telegraph Co. (20 Iowa 195), Vol. II, p. 800.

2. Trial—General and Special Verdict—Answer a Special Interrogatory—When N
The failure of a jury to answer one of several for a special finding, will not be ground for a special finding, when it appears on the general verdict, when it appears to such interrogatory the general verdict must

Reaffirmed and explained in Sutherland Ins. Co., 87 Iowa 513, 54 N. W. 456, holding that a jury to return a special finding will not be ground for a special finding, because of the failure, it is manifest from the fact that the jury has not found the necessary facts to authorize

Reaffirmed and explained in Correll v. Iowa 337, 81 N. W. 725, holding that the failure to answer a special interrogatory which it would be the trial court to submit—that is one necessary to arriving at the general verdict—is not reversible error.

Distinguished and narrowed in Darlin v. Iowa 264, 1 N. W. 535, holding that where a jury returns a special finding and a general verdict necessary to the general verdict, a motion for a new trial on ground will be sustained.

Cross references. See further on this question Rule 1 of Dively v. City of Cedar Falls (25 Iowa 264); Rules 1 & 2 of Hardin v. Branner (25 Iowa 264).

COAKLEY v. McCARTY, 34

1. Pleadings—Practice—Waiver of Error—Court overruling a motion to make the petition by the defendant thereafter answering and joined, p. 107.

Reaffirmed in Kline v. K. C. St. J. & M. 657; Randolph v. Town of Bloomfield, 77 Iowa 268, 41 N. W. 563; Ida County v. Woods 247; Manatt v. Shaver, 98 Iowa 356, 357; Town of West Bend, 101 Iowa 671, 70 N. W. 110 Iowa 264, 81 N. W. 470; Carlson v. Iowa 571.

Reaffirmed and extended in Mann v. T. W. 220, holding further that the defendant

the Supreme Court, unless a motion for such correction is made below before prosecuting the appeal.

Such an error is one relating to the form, kind or recitals of a judgment, p. 108.

Special cross reference. For cases citing and sustaining the text, and many others on this question, see annotations under *Dickey v. Harmon* (26 Iowa 501), ante. p. 354.

GUTHRIE COUNTY v. CARROLL COUNTY, 34 IOWA 108

1. Swamp Lands Held by County—When Not Liable for Taxation.—Before the enactment of the Act of April 16, 1870, swamp lands held by a county, although lying in another county, were not subject to taxation, pp. 110, 111.

Reaffirmed in Iowa R. R. Land Co. v. Story County, 36 Iowa 51; *Sully v. Poorbaugh*, 45 Iowa 455; *Callanan v. Wayne County*, 73 Iowa 711, 36 N. W. 655.

PLUMB v. WOODMANSEE, 34 IOWA 116

1. Attachment—Action on Bond for Damages—Measure of Damages—Proximate Damages.—In an action on an attachment bond for the wrongful suing out of an attachment, the damages must, unless malice or wilfulness on the part of the defendant (plaintiff in the attachment action) in suing out the writ, be shown, be confined to compensation by reason of the natural and proximate consequences of the issuance and levying of the writ, p. 119.

Reaffirmed and extended in Rice v. Whitley, 115 Iowa 751, 87 N. W. 695, holding further—as does the present case in argument—that in an action for a tort the plaintiff must show that the particular damage in respect to which he proceeds is the legal and natural consequence of the wrongful act imputed to the defendant.

Unreported citation, 132 N. W. 429.

Special cross reference. For further cases citing and explaining the text, and many others, see annotations under Rule 2 of *Campbell v. Chamberlain*, (10 Iowa 337), Vol. I, p. 698.

2. Attachment—Wrongful Suing Out—Action for Damages—What Attorney's Fees Not Recoverable.—In an action for the wrongful suing out of an attachment, attorney's fees incurred by plaintiff in defending the attachment action and defeating the defendant's claim, are not recoverable as damages, p. 122.

Reaffirmed in Sadler v. Bean, 38 Iowa 684 (abstract).

Reaffirmed and explained in Ames v. Chirurg, 152 Iowa 284, holding that as a rule attorney's fees for defending the main action cannot be recovered in an action on the attachment bond.

Reaffirmed and qualified in Peters v. Snively-Ashton, 144 Iowa 153, 120 N. W. 1051, holding that in an action on an attachment bond

property be seized and held by an officer without legal process, replevin may be maintained without regard to its character: And that if the process issue from a court having no jurisdiction of the subject-matter, or if an execution issue without a judgment having been rendered, or if the law under which the process is issued be unconstitutional, the process is void, and replevin may be maintained for property seized by the officer.

Reaffirmed and extended in Ramsden v. Wilson, 49 Iowa 212, holding further that the owner of personal property, with the right to its possession, may maintain replevin therefor against an officer who has seized it under a process against another person.

Reaffirmed and qualified in Armel v. Lendrum, 47 Iowa 537, Morgan v. Zenor, 88 Iowa 178, 55 N. W. 198, holding that replevin does not lie to recover personal property seized under a legal writ issued by a court having jurisdiction of the subject-matter.

STATE v. PORTER, 34 IOWA 131

1. Criminal Law—Homicide—Evidence—Opinions of Medical Experts.—The opinions of medical men, who are shown to be experts, as to the instruments producing, and the nature and consequences of wounds or the causes of diseases, are competent evidence in a prosecution for homicide, p. 134.

Reaffirmed in State v. Tippet, 94 Iowa 649, 63 N. W. 446; State v. Seymour, 94 Iowa 705, 63 N. W. 663; State v. Brandenberger, 151 Iowa 205, 130 N. W. 1068.

Reaffirmed and explained in Sachra v. Town of Manilla, 120 Iowa 567, 568, 95 N. W. 200, holding that what *in fact* causes a wound or injury is a question for the jury but what *might or might not* have caused it is a matter of expert testimony.

Reaffirmed and varied in Degelau v. Wight, 114 Iowa 55, 86 N. W. 37; Morrow, Gdn., v. Nat'l Masonic Acc. Ass'n, 125 Iowa 639, 101 N. W. 470, holding that the rule is equally applicable in civil actions for death by wrongful act, negligence, or unskillfulness.

2. Criminal Law—Homicide—Self Defense—Proof Required by State—Reasonable Doubt.—Upon the trial of a criminal case the accused is entitled to an acquittal if, from all the evidence introduced, there arises a reasonable doubt of his guilt in the minds of the jury.

So upon the trial of an indictment for murder the accused is entitled to an acquittal if, from all the evidence introduced, it does not appear beyond a reasonable doubt that at the time of the killing he was not acting in self defense, p. 140.

Reaffirmed as to first paragraph in State v. Emerson, 48 Iowa 174.

Reaffirmed as to second paragraph in State v. Fowler, 52 Iowa 106, 2 N. W. 983; State v. Jones, 52 Iowa 152, 153, 2 N. W. 1062; State v. Cross, 68 Iowa 197, 198, 26 N. W. 70; State v. Dillon, 74 Iowa 656, 657, 38 N. W. 528.

Reaffirmed and extended as to second paragraph in State v. Shea, 104 Iowa 726, 74 N. W. 687; *State v. Yates*, 132 Iowa 479, 109 N. W. 1006, holding further that the rule applies upon the trial of an indictment for assault with intent to commit murder.

3. Homicide—Insanity as Defense—Uncontrollable Impulse—Right and Wrong Test—Evidence.—Upon the trial of an indictment for murder where insanity is set up as a defense, the right and wrong test controls criminal responsibility when the insanity consists in a want of intellectual power; but this test does not control it when the insanity consists in an uncontrollable impulse overcoming the will of the accused.

So upon the trial of such indictment and under such plea when a witness testifies on behalf of accused that he (accused) "never was just right" and details the facts on which he bases his opinion, the State may, on cross examination, ask the witness whether he believes accused has "sense enough to know right from wrong," p. 137.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Rules 3-5 of *State v. Felter* (25 Iowa 67), ante. p. 233.

4. Homicide—Evidence—Res Gestæ—Declaration of Deceased as.—Surrounding circumstances, constituting part of the *res gestæ*, may always be shown to the jury along with the principal fact; and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are, whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character.

This rule applies to declarations of the deceased when offered in evidence upon the trial of an indictment for murder, p. 138.

Reaffirmed and explained in State v. Kuhn, 117 Iowa 223-225, 90 N. W. 736, holding that upon the trial of a wife accused of the murder of her husband by poison, statements of the deceased in her absence, that she had poisoned him, are competent as part of the *res gestæ*.

STATE v. WELPTON, 34 IOWA 144

1. Adverse Possession—Highway—Prescription.—Ten years continued and adverse use of a highway by the public under color of title or claim of right establishes it by prescription and bars the land owner of his rights. But the use of the highway must correspond with or be as broad as the claim of right, in order that this rule apply.

Where a public road is established by legal proceedings, a prescriptive use will not be made out because the road as used slightly varies from the line establishing it as set out in the order of court, pp. 146, 147.

Reaffirmed as to first paragraph in Bolton v. McShane, 79 Iowa 28, 44 N. W. 212; Kelsey v. Furman, 36 Iowa 615, 616.

Reaffirmed as to second paragraph in State v. Gould, 40 Iowa 374.

Reaffirmed and explained as to first paragraph in State v. Waterman, 79 Iowa 367, 44 N. W. 679, holding that where the public uses a road under claim of right for the statutory period of ten years and with knowledge of, and without objection by the land owner, it establishes a highway by prescription, although the use by the public is under a void legal proceeding establishing the highway.

Reaffirmed and explained as to first paragraph in Doolittle v. Bailey, 85 Iowa 401, 52 N. W. 338; Skinner v. Crawford, 54 Iowa 120, 121, 6 N. W. 145; Wacha v. Brown, 78 Iowa 433, 434, 43 N. W. 269, holding that in order to constitute adverse possession the claimant must make his claim of right as broad as his possession.

Cited with approval in Johnson v. City of Burlington, 95 Iowa 199, 63 N. W. 694, the case turning on another point.

Distinguished and narrowed in Buch v. Flanders, 119 Iowa 167, 168, 93 N. W. 102, holding that in the absence of other controlling circumstances, the inference is conclusive that the division line between adjoining tracts, definitely marked by the erection and maintenance of a fence or other monuments, recognized by the owners as such, and up to which they have occupied and cultivated the land on either side more than ten years,—the statutory period of limitations—is the true boundary between them; and that where parties have agreed, either expressly or by long acquiescence, that the lines of a highway, as actually laid out, or as determined upon and marked out by them, shall constitute the boundary lines between their respective holdings, the case stands as though a hedge, fence or other monument should be agreed upon as marking the true line.

Distinguished and narrowed in Quinn v. Baage and Heiber, 138 Iowa 436-438, 114 N. W. 209, holding that where there has been no practical location of boundaries of a highway as surveyed, the public is not estopped or bound by acquiescence in the maintenance of a fence by the abutting land owner within the limits of a strip established as a highway, however long continued.

(Note.—This Quinn case partially overrules Axmear v. Richards, 112 Iowa 657, 84 N. W. 686.—Ed.)

Overruled as to second paragraph in Miller v. Mills County, 111 Iowa 660-662, 82 N. W. 1041, holding that the division line between two adjoining tracts of land, definitely marked by the erection and maintenance of a fence or other monuments, recognized by the owners as such, and up to which they have occupied and cultivated the

land on either side more than ten years,—tations,—is the true boundary between the

Cross references. See further on this: Grube v. Wells (34 Iowa 148) infra next (30 Iowa 258), ante. p. 594; Burdick v. F. p. 130; Onstott v. Murray (22 Iowa 457),

2. Lands—Dedication to Public Use
Dedicandi.—A dedication of land to the intention and clear assent of the owner relied upon to establish it, they must be made with any inference except the *animus dedi*

Reaffirmed in Town of Mt. Vernon 524, 100 N. W. 697.

(Note.—There are other cases sustained.—Ed.)

GRUBE V. WELLS, 34 IOWA

1. Adverse Possession—Sufficiency
Burden of Proof.—In order to constitute such as will defeat its recovery by the true owner have been taken by the person relying on color of title or claim of right and with the true owner, and he must have so held and held the land openly, continuously and notoriously ten years. The claim of right or color of title correspond to the land in possession.

The facts relied upon to constitute a claim strictly proved by the party relying thereon.

Reaffirmed in Solberg v. City of Decatur, Welpton, 34 Iowa 147, 148; Skinner v. City of Decatur, 6 N. W. 145; Crapo, Ex'r, v. Cameron, 61 Iowa 173, 7 Am. St. Rep. 474, 37 N. W. 433, 434, 43 N. W. 269; Bolton v. M. W. 212; Wilson v. Gunning, 80 Iowa 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

146 Iowa 232, 124 N. W. 1087; Keller v. Harrison, 151 Iowa 323, 133 N. W. 764.

Reaffirmed and extended in Wickham v. Henthorn, 91 Iowa 244, 245, 59 N. W. 277, holding further that an entry on land without color of title or claim of right may become adverse by subsequently acquiring color of title or claim of right, and holding under it; but the possession is only adverse from the time of acquiring such title or claim of right.

Cited with approval in Erickson v. Slate, 130 Iowa 190, 106 N. W. 622, turning on another point.

Cited in Johnson v. City of Burlington, 95 Iowa 199, 63 N. W. 694, the case turning on another question.

Distinguished in Miller v. Mills County, 111 Iowa 660, 661, 82 N. W. 1041; Lawrence v. Washburn, 119 Iowa 110-112, 93 N. W. 74, 75; O'Callahan v. Whisenand, 119 Iowa 568, 93 N. W. 579, holding that the division line between adjoining tracts of land, definitely marked by the erection and maintenance of a fence or other monuments, recognized by the owners as such, and up to which they have occupied and cultivated the land on either side more than ten years—the statutory period of limitations—is the true boundary between them.

(Note.—Miller v. Mills County, 111 Iowa 660, 661, partially overrules Axmear v. Richards, 112 Iowa 657, 84 N. W. 686.—Ed.)

Distinguished in Foulke v. Stockdale, 40 Iowa 100, 101; Hiatt v. Kirkpatrick, 48 Iowa 80; Tracy v. Newton, 57 Iowa 212, 10 N. W. 637; Wilson v. Gunning, 80 Iowa 334, 45 N. W. 921; Klinker v. Schmidt, 114 Iowa 697-699, 87 N. W. 662; Rattray v. Talcott, 124 Iowa 400, 100 N. W. 37; Ch. M. & St. P. Ry. Co. v. Hanken, 140 Iowa 375-378, 118 N. W. 528, holding that when adjoining land owners acquiesce in a line assumed to be the boundary line between their lands, or establish a boundary line and occupy in reference thereto for the period of ten years, they are estopped from thereafter denying that such line is the true boundary between their estates.

Distinguished in Quinn v. Baage and Heiber, 138 Iowa 436-438, 114 N. W. 209, holding that where there has been no practical location of boundaries of a highway as surveyed, the public is not estopped or bound by acquiescence in the maintenance of a fence by the abutting land owner within the limits of a strip established as a highway, however long continued.

Distinguished in Johnson v. City of Shenandoah, 153 Iowa 500, holding that the doctrine of adverse possession does not apply to municipalities or other bodies exercising governmental functions.

Unreported citation, 128 N. W. 852.

Cross references. See further on this question, annotations and cross references under Hamilton v. Wright (30 Iowa 480), ante. p.

628; *State v. Crow* (30 Iowa 258), ante. p. 428; *McNamee v. ante. 308*; *Onstott v. Murray* (22 Iowa 45;

ARTZ v. CHICAGO, ROCK ISLAND & PACIFIC
(Later Appeals, 38 Iowa 293;

1. Railroads—Public Crossings—Duty to Give Signals on Approaching.—There (Code of 1860) requiring a railroad company to sound the whistle upon the approach of the train. But even without this statutory provision a railroad company to ring the bell or sound the whistle upon approaching a public crossing, when by the nature of the other surroundings it is difficult for a traveling train in time to avoid danger; a failure to give such signals in such a case will constitute negligence of the railroad company to give such signals upon their train approaching a public crossing will or will not constitute negligence depending upon the circumstances of each case, pp. 157, 158.

Reaffirmed in Gates v. B. C. R. & M. F. Applying the rule in an action against a railroad company for killing at a public crossing, being driven by the company's train.

Reaffirmed in Funston v. Ch. R. I. & N. W. 459, 16 N. W. 521.

Distinguished and extended in Kinyon v. Chicago & N. W. 118 Iowa 355-359, 96 Am. St. Rep. 382, 92 N. W. 118. That although Sec. 2072 of the Code of 1860 required a railroad company to sound the whistle when approaching a public crossing, yet it must give such signals with due regard to the dangers of the crossing, if by reason of the speed of the train or other dangers of the crossing, an earlier signal would be necessary—caution—and a failure to give such signal constitutes negligence on the part of the company.

Unreported citation, 103 N. W. 362.

2. Negligence—Contributory Negligence—Law for Court and When Question of Facts.—In an action for personal injury the negligence of the defendant when all the evidence shows that the plaintiff was guilty of negligence or was materially contributing to the accident, then the burden is on the plaintiff for the court and it is his duty to instruct the jury accordingly. But when there is a conflict in the evidence as to the question of contributory negligence it is for the jury to determine the instructions of the court as to the law in relation to contributory negligence.

So in an action for personal injuries caused to a traveler of a highway by a train at a crossing, when the proof shows without conflict that the view of the approaching train was unobstructed, and if the plaintiff had looked he could have seen the train and avoided the injury, the plaintiff is, as a matter of law, guilty of contributory negligence.

But if in such case, the view of the railroad as the crossing is approached upon the highway, is obstructed by any means, so as to render it impossible or difficult to learn of the approach of a train or there are complicating circumstances calculated to deceive or throw a person off his guard, then whether it was negligence on the part of plaintiff or the person injured in not looking, under the particular circumstances of the case, is a question of fact for the jury, pp. 158-161.

Reaffirmed as to first paragraph in Smith v. C. R. I. & P. R. R. Co., 55 Iowa 36, 7 N. W. 399; Taylor v. Wabash Ry. Co., 112 Iowa 160, 161, 83 N. W. 893; Selensky v. Ch. G. W. Ry. Co., 120 Iowa 117, 118, 94 N. W. 273.

Reaffirmed as to second paragraph in Payne v. C. R. I. & P. R. R. Co., 39 Iowa 526; Starry v. D. & S. W. R. R. Co., 51 Iowa 421, 1 N. W. 606; McLeod v. Ch. & N. W. Ry. Co., 125 Iowa 272, 101 N. W. 78.

Reaffirmed as to last paragraph in Laverenz v. C. R. I. & P. R. R. Co., 56 Iowa 693, 694, 10 N. W. 270; Lee v. Ch. R. I. & P. Ry. Co., 80 Iowa 177, 45 N. W. 741; Wimey v. Ch. M. & St. P. Ry. Co., 92 Iowa 625, 626, 61 N. W. 219; Selensky v. Ch. G. W. Ry. Co., 120 Iowa 117, 118, 94 N. W. 273; Ames v. Waterloo & Cedar Falls R. T. Co., 120 Iowa 665, 95 N. W. 169; Parker v. Des Moines City Ry. Co., 153 Iowa 264, 126 N. W. 923.

Reaffirmed and explained in Haines v. Ill. Cent. R. R. Co., 41 Iowa 231, 232, holding that in an action for personal injuries to a traveler by a railroad train at a highway crossing when the evidence was conflicting as to whether the view was so obstructed as to have prevented the plaintiff from seeing the train approaching in time to have avoided the accident, it was reversible error for the trial court to give the following instructions, to-wit: "12. If you find from the evidence that the plaintiff, knowing the position of the railroad track, and that trains were run frequently thereon, approached the crossing without looking in the direction from which the train was coming, and without stopping his team to listen for an approaching train, so closely that he was unable to stop his horses before getting upon the track, and in consequence thereof the collision occurred, the plaintiff cannot recover in this action." "11. If you find from the evidence that the plaintiff could have seen the approaching train by looking in the direction of it before he reached the crossing, and in time to have avoided the collision by ordinary care, and omitted to do so, such omission was negligence, and you should find for the defendant."

Reaffirmed and explained as to first paragraph in Milne v. Walker, 59 Iowa 188, 13 N. W. 102, holding that if in an action for negligence there are no complicating circumstances, and if the undisputed facts are such that a reasonable mind can draw no other conclusion than that the plaintiff was in fault, it is the province of the court to determine the question of contributory negligence as a matter of law.

Reaffirmed, explained and qualified as to second paragraph in Schaefer v. Ch. M. & St. P. Ry. Co., 62 Iowa 627, 17 N. W. 894, holding that where a person traveling on a highway and approaching a known crossing of a railroad track, with knowledge that the view of an approaching train is to an extent obstructed, heedlessly permits a team he is driving to pass over such highway "pretty fast," or allows the horses to trot, and makes no effort to look or listen for an approaching train for a distance of eighteen rods from the track, he is guilty of such contributory negligence as will prevent him from recovering, if a collision occurs, provided there are no circumstances which are calculated to distract his attention.

Reaffirmed and extended as to second paragraph in Carlin v. Ch. R. I. & P. R. Co., 37 Iowa 322, 323, holding further that the rule is equally applicable where one is injured by a train while walking on a railroad track, when he swears that had he looked he could have seen the train approaching, but that he did not look.

Reaffirmed and extended as to second paragraph in Banning, Adm'r, v. Ch. R. I. & P. Ry. Co., 89 Iowa 79, 56 N. W. 278, holding that where one is about to cross a railroad track, and knows that there are obstacles which may prevent his seeing an approaching train, and there is nothing to prevent his stopping and listening, and his attention is in no way diverted by surrounding circumstances from listening, and it appears that, if he had listened, the injury would have been avoided, his failure to listen constitutes such contributory negligence as will defeat recovery for his death.

Reaffirmed and varied as to first paragraph in Correll v. B. C. R. & M. R. Co., 38 Iowa 125, 126, 18 Am. Rep. 22, applying the rule in an action of damages for stock killed by a train in a city limits at a street crossing while being driven; and holding, also, that the driver had a right to presume that the train would not be running at a greater rate of speed than prescribed by an ordinance of the city.

Cited in Graham, Adm'r, v. Ch. & N. W. Ry. Co., 143 Iowa 615, 119 N. W. 711, the court holding—as does the present case—that the testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court.

Distinguished as to second and third paragraphs in Dow v. Des Moines City Ry. Co., 148 Iowa 441, holding that the rule of these

paragraphs is inapplicable to an injury to a traveller by a street railway; and that one about to cross or go upon a street railway track is required to use only ordinary care to avoid injury.

Unreported citation, 133 N. W. 377; 136 N. W. 1051.

CITY OF DUBUQUE v. HARRISON, 34 IOWA 163

1. Statutes—Construction—Repeal by Implication Not Favored.—The repeal of a prior statute by implication is not favored; and courts will so construe a prior and subsequent statute so that both may, if possible, be given effect, pp. 167, 168.

Reaffirmed in Risdon v. Shank, 37 Iowa 84; State v. Brandt, 41 Iowa 614; Lambe v. McCormick, 116 Iowa 172, 89 N. W. 242; State v. Higgins, 121 Iowa 25, 95 N. W. 246.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

WARREN v. EWING, 34 IOWA 168

1. Interest—Contracts or Notes Providing for More Than Legal Rate of Interest.—Money due upon or under a note or contract which provides for a greater rate of interest than allowed by law, will bear interest at the stipulated rate from the maturity of the note or contract, or the time the money becomes due, pp. 173, 174.

Distinguished in Bousquet, trustee v. Ward & O'Farrell, 116 Iowa 129, 89 N. W. 197, a case of peculiar facts, and involving liability of guarantors for interest of more than legal rate, on a debt which they guarantee.

PRESCOTT v. GONSER, AUDITOR, 34 IOWA 175

1. Counties—Warrants of—Failure to Affix Seal—Effect—Mandamus.—A county warrant issued by the clerk of the county board of supervisors is of no effect, under Secs. 312, 319, 321 of the Code of 1860, unless the seal of the County be affixed thereto.

When a county warrant is issued without the seal of the county affixed thereto, mandamus lies in favor of the drawee or his assignee to compel the clerk of the county board of supervisors or his successor in office to affix the seal thereto, pp. 176-178.

Reaffirmed as to first paragraph in Springer v. Clay County, 35 Iowa 243.

Cited in Bradfield v. Wart, 36 Iowa 295, 296, the court holding that mandamus lies to compel a board of canvassers to count the returns of an election.

Cited in Walters-Cates v. Wilkinson, 92 Iowa 133, 60 N. W. 516, the case turning on other questions.

2. Mandamus—Limitation of Actions.—Under Sec. 2740 of the Code of 1860, a mandamus proceeding to compel a public officer to perform an imperative duty or official act is barred unless commenced

within three years from the time the plaintiff had the right to demand performance, and upon refusal by the officer, immediately bring his proceeding. A party entitled to mandamus to compel a public officer to perform such a duty or official act, cannot suspend or extend the period of the statute of limitation by failing to demand performance after he has a right to make such demand, pp. 179-181.

Reaffirmed in Beecher v. Clay County, 52 Iowa 141, 142, 2 N. W. 1038; Dewey v. Lins, 57 Iowa 236, 237, 10 N. W. 661; Hintrager v. Traut, 69 Iowa 747, 748, 27 N. W. 808, under Sec. 2529 of the Code of 1873, corresponding to the section of the text.

Cited in State v. Henderson, 40 Iowa 245, the case involving the statute of limitation as to an action on the official bond of a public officer for failing to pay over money.

Distinguished in Harwood v. Quinby, 44 Iowa 391, 392, holding that the rule is inapplicable and the statute does not commence to run against the person entitled to a mandamus until he has a right to demand performance by the officer; and that before such time the Legislature may extend the period of limitation.

Distinguished in Eyerly v. Brd. of Supervisors of Jasper County, 77 Iowa 473-475, holding that a mandamus proceeding to compel a county board of supervisors to pay over money collected as a tax to aid in the construction of a railroad is not barred until three years after the termination of an action to test the validity of such tax.

Special cross reference. For further cases citing, varying and distinguishing the text, and others closely connected herewith, see annotations under Rule 2 of Baker v. Johnson County, (33 Iowa 151) ante. p. 798.

SCHUSTER v. MARDEN, 34 IOWA 181

1. Promissory Note—Assignment after Maturity—Action on—Defenses.—In an action by the assignee of a promissory note who took after maturity, the maker (defendant) may set up any defenses which he might have set up had the note not been assigned and the action been brought by the payee, pp. 183, 184.

Cited in Dille v. White, 132 Iowa 353 (dissenting opinion), 10 L. R. A. (New Series) 510, 109 N. W. 919, the majority court opinion not in point.

IN RE CURLEY, 34 IOWA 184

1. Habeas Corpus—Appeal from Judgment of Judge of Supreme Court on.—Under Secs. 2631-2634 of the Code of 1860, no appeal lies to the Supreme Court from judgment in a *Habeas Corpus* proceeding rendered by a judge of that court, pp. 186-189.

Cited in Ware v. Sanders, 146 Iowa 242, 124 N. W. 1084, the court holding that the jurisdiction of the Supreme Court in *Habeas Corpus*

proceedings is—under Sec. 4419 of the Code of 1897—co-extensive with the state, and is not affected by Sec. 4420 thereof.

Cited in City of Davenport v. D. & St. P. R. R. Co., 37 Iowa 625; Bennett v. Hetherington, 41 Iowa 149, not in point.

CLARK v. ALLEN, 34 IOWA 190

1. **Conveyance—Delivery of with Name of Grantee Blank—Filling in by Grantee—Rights of Innocent Purchaser.**—Where a deed to land is delivered with the name of the grantee blank, with the understanding that the purchaser fill in as the name of the grantee the person to whom he later sells it, and the first purchaser fills in his own name as the grantee, the instrument is valid in favor of an innocent purchaser for value, pp. 192, 193.

Special cross reference. For cases citing and sustaining the text, and others, see annotations under Owen v. Perry (25 Iowa 412), ante, p. 281.

DURANT v. KAUFFMAN, MARSHALL; 34 IOWA 194

1. **Municipal Corporations—Taxation and Revenue—Agricultural Lands, When Not Subject to City Taxation.**—Lands lying within a city's limits, but which are used exclusively for agricultural purposes and derive no benefit from being within the city, are not subject to taxation for general municipal purposes, pp. 195-197.

Reaffirmed in Taylor v. City of Waverly, 94 Iowa 663, 63 N. W. 347.

Reaffirmed and qualified in Sears v. Iowa Midland R. R. Co., 39 Iowa 418, 419, holding that farm lands in a city limits may be taxed in aid of the construction of a railroad, where the tax is legally voted.

Reaffirmed and qualified in Farwell v. Des Moines Brick Mfg. Co., 97 Iowa 293-295, 35 L. R. A. 63, 66 N. W. 179, holding that in order for land within a city boundary to be exempt from taxation for municipal purposes it must be used in good faith for agricultural purposes: Holding further that a taxation or assessment for pavements, is not "taxation for city purposes" within the meaning of the exemption.

Cross reference. See further on this question, annotations and cross references under Rule 1 of Buell v. Ball, Marshall (20 Iowa 282), Vol. II, p. 817.

CANNON v. IOWA CITY, 34 IOWA 203

1. **Trial—Practice—Order of Introduction of Evidence—Discretion of Trial Court—Abuse—Reversal.**—The trial court has a large judicial discretion as to the order of the introduction of evidence, and his ruling thereon will not be ground for reversal, except in case

of a clear abuse of such discretion and result in substantial rights of the party appealing and contrary to public policy.

Special cross reference. For cases citing and others, see annotations under Rule 2 of the Rules of the Supreme Court (31 Iowa 289), ante. p. 675.

MYERS v BYINGTON, 34 Iowa 289.

1. Debtor and Creditor—Accord and Satisfaction of Less Sum Than Is Due.—The acceptance by a debtor of a less sum than is legally due, with an agreement that it is in full payment or satisfaction, will not defeat recovery of the balance by the creditor.

Reaffirmed in Bender v. Been, 78 Iowa 43 N. W. 217; Cartan & Jeffrey v. Tackabach, 589, 117 N. W. 953.

Reaffirmed and qualified in Stoutenberg v. Man, 93 Iowa 216, 217, 61 N. W. 918, holding that the consideration for the agreement by which a debtor pays a less sum in full of his debt, or if a new creditor, or if such agreement is made in consideration of a claim and to avoid litigation, then the agreement for the lesser sum is a full satisfaction of the entire claim.

Reaffirmed and qualified in Marshall v. Marshall, 54 L. R. A. 862, 87 N. W. 428, holding that the agreement whereby the creditor is to take a less sum in full of his debt, the agreement and the sum will constitute an accord and satisfaction if the debt is paid before due, or at a place other than where the obligor was legally required to pay, or if payment is made by the debtor or his creditors generally, in which they agree to accept the sum, the consideration is held to be sufficient. That if a stranger or third person pays to a creditor in full of his debt and for the debtor, and in full satisfaction, it will be an accord and satisfaction.

Reaffirmed and qualified in Rauert, Administrator, 129 Iowa 741-743, 106 N. W. 204, holding that the payment of less than the full amount of a doubtful or unsettled claim or compromise thereof is an accord and satisfaction of the entire claim.

SCOTT v. CITY OF DAVENPORT, 34 Iowa 289.

1. Municipal Corporations—Constitutional Limitation of Indebtedness of City.—A city has no power to incur a debt in excess of its constitutional limit.

prescribed by Sec. 3, Art. 11 of the Constitution of 1857, for the purpose of erecting a water-works system to be owned, controlled and operated by the city, pp. 212-214.

Cited in Koster v. Seney, 100 Iowa 567 (dissenting opinion), 69 N. W. 871, the majority court opinion not in point.

Cited in Brown v. Cairns, Bolton & Foster, 107 Iowa 730, 77 N. W. 480, not in point.

Special cross reference. For further cases citing, sustaining and distinguishing the text and others, see annotations under Rule 2 of Dively v. City of Cedar Falls (27 Iowa 227), ante. p. 394.

METTEER, v. WILEY, 34 IOWA 214

1. Wills—Widow's Election to Take under Will—When Does Not Bar Dower.—The acceptance of the provisions of a will by the widow of testator does not bar her right to dower, where there is no express declaration in the will providing therefor, or the intention that dower be so barred is not clearly and manifestly deducible from the will itself, founded on the fact that the claim of dower is inconsistent with the will, or so repugnant to some of its dispositions as to disturb and defeat them.

So where a testator bequeaths and devises all his real and personal property to his wife during her natural life, to be divided at her death among the children of testator, such Will does not bar the wife of dower upon her accepting the provisions thereof, p. 216.

Reaffirmed in Watrous v. Winn, 37 Iowa 74; McGuire v. Brown, 41 Iowa 655; Potter v. Worley, 57 Iowa 67, 68, 7 N. W. 685; Blair v. Wilson, 57 Iowa 178, 10 N. W. 328; Daugherty v. Daugherty, 69 Iowa 679, 680, 29 N. W. 779; Howard v. Warson, 76 Iowa 230, 41 N. W. 45; Richards v. Richards, 90 Iowa 609, 58 N. W. 927; Bare v. Bare, 91 Iowa 145, 59 N. W. 21; Hunter v. Hunter, 95 Iowa 732-735, 58 Am. St. Rep. 455, 64 N. W. 657; Sutherland v. Sutherland, 102 Iowa 537, 63 Am. St. Rep. 477, 71 N. W. 425; In re estate of Proctor, 103 Iowa 238, 72 N. W. 517; Archer v. Barnes, 149 Iowa 660, 661, 128 N. W. 970.

Reaffirmed as to first paragraph in Van Guilder v. Justice, 56 Iowa 669, 670, 10 N. W. 238; Snyder v. Miller, 67 Iowa 264, 265, 25 N. W. 242; Herr v. Herr, 90 Iowa 540, 58 N. W. 898; Bentley v. Bentley, 112 Iowa 626, 84 N. W. 677; Parker v. Parker, 129 Iowa 602, 603, 106 N. W. 9.

Reaffirmed and explained in Potter v. Worley, 57 Iowa 67, 68, 7 N. W. 685; In re estate of Potter, 103 Iowa 238-240, 72 N. W. 517, holding that when a widow's claim to dower is not inconsistent with her husband's will, she is not required to object to or relinquish her rights under the will before she can have dower; and that in such case, dower vests in the widow at her husband's death, without action on her part, and regardless of the provisions of his will.

MILLER v. MUTUAL BENEFIT INSURANCE CO., 34 IOWA 222

(Former Appeal, 31 Iowa 216; later appeal, 39 Iowa 304.)

1. Life Insurance—Action on Policy—Defense That Insured Died from Intemperance—Sufficiency of Evidence to Support.—In an action on a life insurance policy containing a provision that the policy is to be void and of no effect if the insured shall die "by reason of intemperance from the use of intoxicating liquors," where the defendant (insurance company) relies, as a defense, upon the death of insured by reason of such intemperance, proof that insured died of congestion of the lungs and brain, or from exposure directly caused from the intemperate use of intoxicating liquors, is sufficient to support the defense, pp. 222, 224, 225.

Reaffirmed and varied in Jordan v. Iowa Mutual Tornado Ins. Co., 151 Iowa 84, holding that the fact that other irresponsible causes may have contributed to the loss of property, is no defense to an action on a policy of tornado insurance.

Unreported citation, 130 N. W. 181.

2. Appeal—Verdict against Evidence as Ground for Reversal.—Where upon appeal to the Supreme Court it appears from the record that the verdict of the jury is palpably unsupported by the evidence, the judgment will be reversed, p. 225.

Reaffirmed in Woodward v. Squires & Co., 39 Iowa 438.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

CITY OF DAVENPORT v. STEVENSON, 34 IOWA 225

1. Municipal Corporations—Railroad Right of Way Granted by City over—Liability of Railroad Company in Damages to Abutting Lot Owners, When.—Under the statute law of this state a railroad company has a right to construct its railroad upon and over the streets and alleys of a city, upon obtaining authority from the city so to do; and the company will not be liable in damages to an abutting lot owner by reason of the construction thereof, unless it is wrongfully or negligently done, pp. 227, 228.

Special cross reference. For cases citing, sustaining, and distinguishing, etc., the text, and many others on the question, see annotations under Milburn v. City of Cedar Rapids (12 Iowa 246), Vol. II, p. 40.

Cross references. See further on this question, annotations under Rule 1 of Slatten v. Des Moines Valley R. R. Co. (29 Iowa 148), ante p. 510; City of Clinton v. Cedar R. & Mo. Riv. R. R. Co. (24 Iowa 455), ante p. 213.

LOCKWOOD *v.* BLACK HAWK COUNTY

1. Attorney and Client—Power of Attorneys in Course of an Action.—Agreements made in open court by the attorneys of record in regard to matters when authorized and free from fraud and error are binding by the courts, when clearly established, p. 237.

Reaffirmed in Am. Em. Co. *v.* Long, 10

WOLVERTON *v.* COLLINS, 34

1. Conveyance—Presumption of Acceptance from Possession by Grantee.—Possession of a deed by the grantee therein creates a presumption that the deed was read and accepted on the date of its execution, which may be overcome by proof, p. 239.

Reaffirmed in Craven *v.* Winter, 38 Iowa, 85 Iowa 153, 52 N. W. 12; Conway *v.* Gray, 165, 117 N. W. 274.

Reaffirmed and explained in Hutton *v.* Hutton, 55 N. W. 326; Foley *v.* McNamara, 93 Iowa 326, holding that the question of whether or not there was delivery of a deed, is always one of the intention of the parties. If it appears from the evidence that a deed was delivered to the grantee without an intention on the part of the grantor to become operative, there is no delivery.

Reaffirmed and extended in McGee *v.* McGee, 117 N. W. 323; Corbin *v.* McAllister, 144 Iowa 323, holding further that the presumption of acceptance from possession of a deed by the grantee requires clear and satisfactory proof.

(Note.—There are other cases sustaining this rule.—Ed.)

Cross references. See further on this question Robinson *v.* Gould (26 Iowa 89), ante. p. 33.

WRIGHT *v.* CONNOR, 34 Iowa

1. Pleading—Demurrer to Part of Cause of Action—Motion to Paragraph or Elect.—Where a cause of action consists of distinct causes of action or defenses in one count, a demurrer may be interposed to the whole or one of them.

However, in such case the better practice is to require the pleader to paragraph or separate his causes of action or to elect upon which one he will rely, p. 238.

Reaffirmed as to first paragraph in Burdett *v.* Burdett, 63, 39 N. W. 183.

Reaffirmed and qualified as to second paragraph in McKay v. McCarthy, 146 Iowa 557, 123 N. W. 759, holding, however, that when an answer contains several defenses in one division, and then pleads each of the defenses in a separate division, a motion to strike from the one division the defenses separately pleaded, is proper.

Distinguished in Ch. Iowa & Dakota Ry. Co. v. Cedar Rapids, Iowa Falls & N. W. Ry. Co., 67 Iowa 330, 25 N. W. 267, holding that when a pleading contains *only one* cause of action or defense, a demurrer does not lie to a part thereof.

DANFORTH v. THOMPSON, 34 IOWA 243

1. Foreign Judgment—Action on—Defenses—Jurisdiction of Foreign Court—Jurisdiction by Consent.—In an action in this state on a foreign judgment it is no defense that the foreign court had no jurisdiction of the parties, when the record shows that the foreign court had jurisdiction of the subject-matter, and that the parties appeared therein and tried the cause on the merits.

Consent or appearance will confer jurisdiction *of the parties*, but not as to the *subject matter* of an action, pp. 245, 246.

Reaffirmed as to second paragraph in Schrader v. Hoover, 87 Iowa 655, 656, 54 N. W. 464; *Porter v. Welsh*, 117 Iowa 146, 90 N. W. 582; *Farmer's Mut. Telephone Co. v. Howell*, 132 Iowa 26, 109 N. W. 295.

SECOND NATIONAL BANK OF ROCKFORD v. GAYLORD, 34 IOWA 246

1. Promissory Note—Guarantor of—Demand on Maker and Notice of Non-Payment—When Delay in Giving or Failure to Give Notice Discharges Guarantor.—Delay in giving or failure to give notice to a guarantor of the payment of a promissory note of demand on and non-payment by the maker will not discharge the guarantor unless he thereby suffered loss, or unless the delay was for such a length of time as to raise a presumption of payment or waiver, pp. 247, 248.

Reaffirmed and explained in Davis Sewing Machine Co. v. Mills, 55 Iowa 544, 8 N. W. 357, holding that where the guaranty is a continuing one, and the parties must have understood the liability thereunder would be increased and diminished from time to time and the guaranty is uncertain as to when it would cease to be binding on the guarantor, and when the party indemnified has the power at pleasure to annul and put an end to the contract guaranteed without the knowledge of the guarantor, the latter must have notice of the amount of his liability within a reasonable time after the transactions under the contract he guarantees are closed; and if the person indemnified fails to so give such notice resulting in loss to the guarantor, the latter is thereby discharged.

CARLIN & HARNEY *v.* HELLER, 34 IOWA 256

1. **Debtor and Creditor—Payment—When Giving of Note Not Payment of Pre-existing Debt.**—Merely giving a note by a debtor to his creditor will not operate as a *payment* of the pre-existing debt for which it was given, p. 258.

Reaffirmed and explained in Dean, Adm'r, *v.* Ridgway, 82 Iowa 759 (abstract), 48 N. W. 925, holding that a note given for interest does not operate in payment thereof, in the absence of an agreement to that effect.

Cited in Dille *v.* White, 132 Iowa 353 (dissenting opinion), 10 L. R. A. (New Series) 510, 109 N. W. 919, the majority court opinion holding that payment by check is dependent upon it being duly honored and cashed, in the absence of an express agreement that it is accepted in satisfaction of the debt: That where a party borrows money executing a mortgage to secure the loan, and accepts checks therefor, that upon their being dishonored, equity will cancel the contract and place the parties in *statu quo*.

Distinguished in Shaw *v.* C. R. I. & P. R. R. Co., 82 Iowa 202, 203, 47 N. W. 1005, holding that the execution and delivery of a due bill and a receipt for an unliquidated and disputed demand is an accord and satisfaction: That the settlement of a disputed claim, although it be of doubtful validity, is a sufficient consideration for such an agreement.

Cross reference. See further on this question, annotations and cross references under Rule 2 of McLaren *v.* Hall (26 Iowa 297), ante. p. 327.

DOUGLASS *v.* TULLOCK, 34 IOWA 262

1. **Tax Sale of Land—Limitation of Action to Recover.**—Under Sec. 790 of the Code of 1860, no action is maintainable for the recovery of land sold for taxes, or involving the title of the tax purchaser, his assignee or grantee unless commenced within five years from the *execution and recording* of the tax deed. And this is the rule although the deed shows on its face that several parcels of land were sold in a lump for a gross sum.

This rule applies in all cases where it is sought to set aside a tax sale of land for irregularities in *the manner* of the sale, p. 263.

Reaffirmed in Bullis *v.* Marsh, 56 Iowa 749, 2 N. W. 578; Monk *v.* Corbin, 58 Iowa 506, 12 N. W. 571; Griffin *v.* Bruce, 73 Iowa 127, 34 N. W. 774.

Reaffirmed and explained in Lawrence & Burd *v.* Hornick, 81 Iowa 196, 46 N. W. 988, holding that when the county treasurer buys land sold for taxes by him or becomes directly or indirectly interested in the purchase thereof, as prohibited by Sec. 885 of the Code of 1873, the sale is *voidable* merely, and the limitation of the text applies to an action to set aside the sale.

But even if a sewer is constructed by a city in a negligent or unskillful manner, it is not thereby a nuisance, and an abutting lot owner has no right to interfere therewith, or abate it as a nuisance, p. 271.

Reaffirmed and explained as to first paragraph in Van Pelt v. City of Davenport, 42 Iowa 313, 20 Am. Rep. 622, holding that when a city, in improving its streets renders a culvert necessary to carry off the surface water, it must exercise reasonable care, judgment and skill in its construction—failing which it will be liable to an abutting lot owner in damages for injuries to the lot, resulting therefrom.

Reaffirmed and explained as to first paragraph in Gallaher v. City of Jefferson, 125 Iowa 332, 101 N. W. 127, holding that a city has a right to establish a grade for a street, and may excavate in order to make the surface of the street conform to the grade as established; but that such work must be done in a proper and reasonable manner, or the city will be liable in damages to an abutting property owner for injuries resulting.

Reaffirmed and explained as to first paragraph in Hume v. City of Des Moines, 146 Iowa 645-650, 1912 B. Am. & Eng. Ann. Cas., 904, 29 L. R. A. (New Series) 126, 125 N. W. 855, holding that a city has power to grade and gutter its streets, and is not liable for defective plans therefor, adopted by it; but it is liable in damages if it negligently carries out such plans or if, without the adoption of any plans, it proceeds in a negligent manner to make embankments or fills, to the injury of an abutting or adjoining proprietor.

Reaffirmed and varied as to second paragraph in Cooper v. City of Cedar Rapids, 112 Iowa 370, 371, 83 N. W. 1051, holding that injunction does not lie upon complaint of an abutting lot owner to restrain the continuance of a temporary open sewer or ditch constructed by a city in a street.

Cited as to second paragraph in Agne v. Seitsinger, 104 Iowa 487, 73 N. W. 1050, not in point, but upon analogy.

Cross reference. See further on this question, annotations and cross references under Rule 2 of Russell v. City of Burlington (30 Iowa 262), ante. p. 595.

AULTMAN, MILLER & CO. v. THEIRER, 34 IOWA 272

1. Sales of Personal Property—Warranty, Breach of—Rights and Remedies of Buyer.—Where there is an absolute warranty of the quality of personal property made by the seller thereof, the buyer may, upon a breach of the warranty, or discovery of the failure of the property to comply therewith, return the property and recover the purchase price, or he may retain the property and recover damages for the breach of warranty, p. 275.

Reaffirmed in McCormick & Bro. v. Dunville, 36 Iowa 650; J. I. Case Threshing-Machine Co. v. Haven, 65 Iowa 360, 21 N. W. 678; Myer & Dostal v. Wheeler & Co., 65 Iowa 395, 21 N. W. 694.

ARMSTRONG v. TAMA COUNTY, 34 IOWA 309

1. Counties—Power of Township Trustees to Aid and Relieve the Poor—Allowance of Claim by Supervisors—Refusal to Allow—Action on.—Where there is no Poor House the township trustees have the right,—under Secs. 1387, 1389 of the Code of 1860—to bind the county in aiding and relieving the necessities of the Poor.

A claim for aid or relief to the Poor of a county, at the instance of or upon the order of the township trustees must—under Sec. 312 of the Code of 1860—be presented for allowance or rejection to the county board of supervisors; but upon its refusal to allow the claim or part thereof, the claimant may sue thereon without appealing from the action of the board, pp. 312, 313.

Reaffirmed as to first paragraph in Hardin County v. Wright County, 67 Iowa 131, 24 N. W. 756, holding that the action of township trustees in granting relief to the poor, if in good faith and if they do not abuse the discretion conferred on them in such matters, is conclusive on the county.

Reaffirmed and varied as to second paragraph in Curtis v. Cass County, 49 Iowa 423; Stone v. Marion County, 78 Iowa 18, 42 N. W. 572, holding that when the board of supervisors refuses to allow an ordinary claim (in these cases, claims of attorneys for services in prosecuting a person on felony charge), the claimant may sue thereon without appealing from the action of the board—and to the same effect is Moser v. Boone County, 91 Iowa 361, 362, 59 N. W. 39, reaffirming the text, and applying the rule to a claim against a county of a physician and surgeon for services rendered at the request of a coroner.

Reaffirmed and varied as to first paragraph in Case v. Davis County, 150 Iowa 555, 556, 129 N. W. 806, holding that when services are rendered for or relief granted to the Poor without the order of the township trustees, they may subsequently ratify the claim and thereby bind the county; but that when, in such case, the trustees refuse to certify such claim to the board of supervisors the remedy of the claimant is by recourse to the supervisors or the courts, and he cannot wait until new trustees go into office, and then again bring the matter before them, have the claim approved and certified, and thereby bind the county.

Reaffirmed and extended in Bradley & Sherman v. Delaware County, 57 Iowa 553-555, 10 N. W. 899, holding further that where a claim for medical attendance upon the poor of a township and upon the order of the trustees thereof, is filed before the board of supervisors, without a certificate of the township trustees as provided by statute, which board allows a portion of such claim, that such action waives objection to the failure to have it certified by the trustees, in an action against the county for the disallowed portion thereof.

FRITZ v. MILWAUKEE & ST. P. R. R. Co., 34 IOWA 337

1. Railroads—Liability for Killing or Injuring Stock.—Under Chap. 169, Acts of 1862 (9th General Assembly) a railroad company is liable absolutely for killing or injuring stock on its track at a place where it has a right to but does not fence, although the stock escapes from an inclosure not lawfully fenced and be running at large contrary to a county regulation at the time of the killing or injuring, p. 338.

Reaffirmed in Tredway v. S. C. & St. P. R. R. Co., 43 Iowa 529.

Cross reference. See further on this question, annotations and cross references under Hinman v. Ch. R. I. & P. R. R. Co. (28 Iowa 491), ante. p. 473.

WINNE v. KELLEY, 34 IOWA 339

1. Damages—Proximate—Speculative and Remote.—Damages which are recoverable must be the proximate and natural consequence of the injury complained of. Speculative, contingent, or remote damages are not recoverable, p. 341.

Reaffirmed in McCormick & Bro. v. Vanatta, 43 Iowa 392; Varner v. St. L. & C. R. R. Co., 55 Iowa 684, 8 N. W. 638; Alexander v. Bishop, 59 Iowa 581, 13 N. W. 718; Gibson & Kloppenstein v. Fischer & Orton, 68 Iowa 32, 25 N. W. 916; Leick v. Fritz, 94 Iowa 326, 62 N. W. 856; Morgan & Wright v. Sutlive Bros., 148 Iowa 331, 126 N. W. 180.

(Note.—There are other cases sustaining, but not citing the text. As each case is dependent upon its own facts for the application of the rule, syllabi of the citing cases are not given.—Ed.)

Cross reference. See further on this question, annotations under Mather v. Butler County (28 Iowa 253), ante. p. 451.

JACOBS v. PORTER, 34 IOWA 341

1. Tax Sale of Land—Redemption by Minor—Limitation of Action for and Extent of Right.—Under Sec. 779 of the Code of 1860, and Chap. 124, Acts of 1866 (11th General Assembly) a minor may, by an equitable action in the district court, commenced within one year after he attains his majority, redeem from a tax sale of his land made during his minority.

But where land owned in common by a minor and adult heirs is sold for taxes the minor may only redeem his interest upon arriving at majority as above—and to this extent the case of Curl v. Watson, 25 Iowa 35, is overruled, pp. 346-348.

Reaffirmed in Stout v. Merrill, 35 Iowa 60; Miller v. Porter, 35 Iowa 166, 167.

Reaffirmed and qualified in Lloyd v. Bunce, 41 Iowa 670, 671, holding that where a widow buys land with money derived from a

pany for which an independent action will lie in favor of the land owner, pp. 357-359.

Reaffirmed in King v. Iowa Midland R. R. Co., 34 Iowa 459; Doud v. Mason City & Ft. Dodge Ry. Co., 76 Iowa 442, 41 N. W. 67; Hunt v. Iowa Cent. Ry. Co., 86 Iowa 20, 21, 41 Am. St. Rep. 473, 52 N. W. 670; Simons v. Mason City & Fort Dodge R. R. Co., 128 Iowa 152, 103 N. W. 134.

Reaffirmed and extended in Hartley v. K. & N. W. Ry. Co., 85 Iowa 467, 52 N. W. 356, holding further that in a proceeding for the condemnation of land for a railroad right of way, opinions of witnesses as to the value of the land before and after the taking thereof, are receivable in evidence, but not opinions as to the amount of damages sustained by the land owner by reason thereof.

Reaffirmed and qualified in Renwick, Shaw & Crossett v. D. & N. W. R. R. Co., 49 Iowa 672; Hoyt v. C. M. & St. P. Ry. Co., 117 Iowa 300, 90 N. W. 726, holding that when a right of way is sought to be taken from one of several contiguous tracts of land and all the tracts are adapted to one use, and are all especially valuable because of adaptability to that use, and are all injuriously affected by the appropriation, they should be treated as constituting one property, and considered as such in the assessment of damages; but that where the tracts are entirely independent, are not contiguous, and there is no evidence that damage to the part actually taken affects the part not touched, the court may and should direct the jury to consider only that part from which the right of way is taken.

Cited in Small v. C. R. I. & P. R. R. Co., 50 Iowa 361 (dissenting opinion), the majority court opinion not in point.

WILSON v. PATRICK, 34 IOWA 362

1. Deed Absolute on Face—When Treated as a Mortgage—Evidence.—A deed which is absolute on its face will be treated as a mortgage if, as a matter of fact, it was intended as a security for a debt.

When a question is to be determined whether a sale and conveyance be absolute or only intended as security, the fact that the consideration is grossly inadequate is a strong circumstance, though not conclusive, in support of the claim, that the deed was intended to operate as a mortgage.

So, also, the fact that the grantee in a deed remained in possession of the lands, is a fact to be taken into consideration in determining whether the deed was absolute or intended as a mortgage, pp. 364, 370.

Reaffirmed as to second paragraph in Caldwell v. Meltveldt and Tow, 93 Iowa 734, 61 N. W. 1092.

Reaffirmed and explained as to first paragraph in Crawford v. Taylor, Richards & Burden, 42 Iowa 263, holding that any deed or contract to or in relation to land which is made to secure a loan of

1. Limitation of Actions—Action to Foreclose Mortgage, etc.
—Under Sec. 2740 of the Code of 1860, an action to foreclose a mortgage on land, or to foreclose a lien given by a title bond, is barred unless commenced within ten years after the cause of action accrues, p. 383.

Reaffirmed in Boynton v. Salinger, 147 Iowa 541, 125 N. W. 996.
Unreported citation, 126 N. W. 371, 135 N. W. 741.

2. Limitation of Actions—Action to Foreclose Mortgage, etc.—Admissions of Nominal Party, Effect.—In an action to foreclose a mortgage on land, brought against the person claiming title thereto adverse to the rights of the mortgagee, and against the mortgagor who has parted with his title and interest, and against whom no relief is asked, the admissions of the latter defendant will not prevent the former one from interposing the plea of the statute of limitations, p. 384.

Cited in Dunton v. McCook, 93 Iowa 264, 61 N. W. 979, the court holding that one who succeeds directly to the rights of the debtor may interpose the plea of the statute of limitations; but that as a general rule the plea is personal to be interposed by the debtor alone.

Cited in Hellman v. Kiene, 73 Iowa 450, 35 N. W. 518, not in point.

Distinguished in Palmer v. Butler, 36 Iowa 581-583; Kerndt & Bros. v. Porterfield, 56 Iowa 415, 9 N. W. 324, holding that one who purchases land with constructive notice of a mortgage thereon and after the mortgagor has revived it by a valid admission that the mortgage debt is unpaid, stands in the same position of the mortgagor from which he purchases and cannot plead the statute of limitation in an action to foreclose the mortgage.

Distinguished in Cook v. Prindle, 97 Iowa 472-474, 59 Am. St. Rep. 424, 66 N. W. 784, holding that one who purchases the mortgaged real estate at a time when the mortgage appears to be barred, may successfully interpose a plea of the statute of limitations, to the foreclosure of such mortgage, which the mortgagors have attempted to revive after they have parted with their title, he having no notice of the revivor.

Distinguished in Jenks v. Shaw, 99 Iowa 611, 61 Am. St. Rep. 256, 68 N. W. 902, holding that an action to foreclose a mortgage is not barred as long as the debt which it is given to secure is enforceable.

COLLINS, ADM'R, v. BANE, 34 IOWA 385

(Later appeal, 39 Iowa 518.)

1. **Action—When Deemed Commenced.**—The delivery of the original notice to the sheriff for the purpose of service is deemed the commencement of the action, p. 388.

Reaffirmed and qualified in Lesure Lumber Co. v. Mut. Fire Ins. Co., 101 Iowa 520, 521, 70 N. W. 763, holding that where in an action on an insurance policy the defendant is not served with original notice but enters his appearance, the action is not deemed to be commenced until such appearance is entered—there being no delivery of the original notice to the sheriff.

2. **Limitation of Actions—Admission That Debt Is Unpaid or New Promise—Sufficiency of to Revive Debt—Evidence—Letter in Writing, etc.—Parol Evidence.**—Under Sec. 2751 of the Code of 1860, in order for a debt which is barred by the statute of limitation to be revived by an admission that it is unpaid, or by a new promise to pay it, the admission or promise must be in writing, signed by the party sought to be thereby charged: But it may be contained in a letter to the creditor or his agent or attorney or person having the duty to collect.

Parol evidence is admissible to explain for whom such a letter was intended, and the subject-matter referred to, and its contents if it is destroyed, pp. 388-390.

Reaffirmed in Miller v. Beardsley, 81 Iowa 722, 45 N. W. 75 under Sec. 2539 of the Code of 1873, corresponding to the section of the text.

Reaffirmed in Senninger v. Rowley, 138 Iowa 621, 116 N. W. 69 under the Code of 1897.

Reaffirmed and explained in First Nat'l Bank of Sigourney v. Woodman' Ex'x, 93 Iowa 673-675, 57 Am. St. Rep. 287, 62 N. W. 230, holding that where a debtor promises his creditor by letter, but the letter is insufficient to identify the debt, parol evidence is admissible for this last purpose, and to make the new promise sufficient in this respect to prevent the bar of the statute of limitation.

Reaffirmed and extended as to first paragraph in Doran v. Doran, 145 Iowa 126-128, 123 N. W. 997, holding further that if a debtor admits in a writing signed by him that a debt is unpaid, it is not necessary that it be addressed to the creditor; but the admission may be addressed to a stranger or even to no one.

Cited in Culbertson v. Salinger, 131 Iowa 322, 108 N. W. 46 not in point.

1. Mortgage—Assignment or Transfer of Debt Secured—Effect.—The assignment or transfer of a mortgage debt carries the mortgage with it, p. 394.

Reaffirmed in Freeburg v. Ersell, 123 Iowa 468, 99 N. W. 120.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

PETERSON v. HAUGEN, 34 IOWA 395

1. Trial—Practice—Jury Taking Papers in Evidence to Jury Room.—Upon retiring to deliberate, the jury may—under Sec. 3068 of the Code of 1860—take papers offered in evidence to the jury room. And where the jury fail to so take any such papers to their room, it is proper for the court, upon request of the jury, to order them sent, p. 398.

Reaffirmed and extended in State v. Young, 134 Iowa 520, 13 Am. & Eng. Ann. Cas., 345, 110 N. W. 298, holding that when requested by either party, the papers and books received in evidence should be sent out with the jury, and refusal to do so is error, which, like other errors occurring during the trial, will be presumed to have been prejudicial, unless the record indicates otherwise.

PARKER v. DUBUQUE SOUTHWESTERN R. R. Co., 34 IOWA 399

1. Appeal—Instructions—Construed Together.—Upon an appeal to the Supreme Court, instructions will be construed together in order to determine whether the correct law was plainly given to the jury as applied to the facts of the case, p. 402.

Reaffirmed in Belair v. C. & N. W. R. R. Co., 43 Iowa 670.

PRICE v. PRICE, 34 IOWA 404

1. Limitation of Actions—New Promise, Sufficiency of.—In order, under Sec. 2751 of the Code of 1860, to revive a debt barred by the statute of limitations a new promise to pay it must be in writing signed by the party to be thereby charged (the debtor). A verbal promise to pay a debt in a mode different from that of the original contract is of no effect for such purpose, if not based upon a new and sufficient consideration, pp. 406, 408.

Cited in Carroll v. McCoy, 40 Iowa 40, not in point.

WOOLSEY v. WILLIAMS, 34 IOWA 413

1. Pleading and Practice—Evidence to Correspond with Pleadings.—Evidence must correspond with the allegations of the pleadings, and the rights of the parties must be determined upon the facts in issue, p. 415.

Reaffirmed and explained in Edgerly v. Farmers' Ins. Co., Iowa 590, 591; Welsh v. Des. Moines Ins. Co., 71 Iowa 339, 32 W. 371; Kern & Son v. Wilson, 73 Iowa 492, 35 N. W. 595; Norwegian Plow Co. v. Clark, 102 Iowa 44, 70 N. W. 812, holding that plaintiff cannot recover except upon evidence sustaining his cause of action as set out in his petition; and cannot recover upon evidence showing a right to recover which is not pleaded by him.

Reaffirmed and explained in Cook v. Smith, 54 Iowa 637, 6 N. W. 259, holding that the plaintiff must recover, if at all, on the allegations of his petition, and if he alleges a special contract he cannot prove the value of his services and recover as if the action had been brought therefor, or on a *quantum meruit*.

(Note.—There are numerous cases sustaining, but not citing the text.—Ed.)

HAUGEN & CO. v. MCCARTHEY, 34 IOWA 415

1. Actions—Venue—Action for Breach of Contract.—Under Sec. 2798 of the Code of 1860, an action for failure to perform a written contract for the purchase of personal property, may be brought in the county wherein it was to have been delivered or performed, p. 417.

Reaffirmed and extended in Sanbourne v. Smith & White, 44 Iowa 154, holding that—under Sec. 2581 of the Code of 1873, corresponding to the section of the text—an action for breach of contract, when the contract expressly provides that it is to be performed in a particular county may be brought in that county, although it be not the county of defendant's residence.

So an action for breach of a written contract by failing to deliver personal property purchased, at a particular place and county as provided by the contract, may be brought in the county where it was to have been delivered.

Reaffirmed and extended in Wayt & Son v. Meighen, 147 Iowa 27, 28, 125 N. W. 803, holding further that under Sec. 3496 of the Code of 1897, corresponding to the section of the text, an action for breach of a written contract may be brought in the county wherein the contract *expressly provides* that it was to have been performed, but not in the county, other than defendant's residence, wherein the contract was to have been performed *as implied* therefrom—and that this rule applies to the venue of an action in a justice's court as provided by Sec. 4481 of that Code.

Cross reference. See further on this question, annotations under Hunt v. Bratt (23 Iowa 171), ante. p. 92.

GRAY v. GRAHAM, 34 IOWA 425

1. Actions—Tender—Effect of—Practice.—The defendant's plea of tender admits the plaintiff's cause of action to the amount tendered and he is entitled to a verdict for at least that amount, p. 426.

Reaffirmed in Rainwater v. Hummell, 79 Iowa 572, 44 N. W. 815.

Reaffirmed and extended in Wilson v. Ch. M. & St. P. Ry. Co., 68 Iowa 674, 27 N. W. 916, holding further that where defendant pleads and tenders an amount due the plaintiff, he cannot thereafter move in arrest of judgment of a verdict in the action, as the latter motion denies plaintiff's right to recover any amount, and is inconsistent with the plea of tender.

Reaffirmed and extended in Taylor v. Ch., St. P. & K. C. Ry. Co., 76 Iowa 756, 40 N. W. 86, holding further that a plea of tender controls and overrides any other defense, to the extent of and which are inconsistent with the tender; and that therefore a plea of tender controls and limits a general denial although they be in different divisions of the pleading.

Distinguished in Wolmerstadt v. Jacobs, 61 Iowa 374, 16 N. W. 218, holding that where in an action at law the defendant pleads a set-off in the nature of a legal defense and an equitable defense, and the plaintiff replies pleading a tender of an amount as the sum due on the equitable issue, but presents a defense to the law issue, and the tender is accepted by the defendant, the legal issue is to be tried as such notwithstanding the tender and its acceptance.

Cross reference. See further on this question, annotations under Phelps v. Kathron (30 Iowa 231), ante. p. 588.

RICHARDS v. DAILY, 34 IOWA 427

1. Negotiable Promissory Note—Assignment of after Maturity—Defenses.—Under Sec. 1794 of the Code of 1860, the holder of a negotiable note who takes it after maturity, takes it subject to all equities and defenses arising out of the note itself, such as payment, want of consideration, or fraud, but not subject to independent set-offs, p. 429.

Cited in State Trust Co. v. Turner, 111 Iowa 676, 53 L. R. A. 136, 83 N. W. 1033, not in point.

Cited in De Laval Separator Co. v. Sharpless, 134 Iowa 32, 111 N. W. 439; the court holding that under Sec. 3461 of the Code of 1897, the assignee of a judgment takes subject to any defense or right of set-off, legal or equitable, which was available in favor of the judgment debtor as against the assignor.

Overruled in Downing v. Gibson, 53 Iowa 518-520, 5 N. W. 701; Bone v. Tharp, 63 Iowa 226, 18 N. W. 907, holding that the assignee of a negotiable note after maturity, or *before maturity* if not in good faith and for value, takes it subject to all counterclaims, defenses or causes of action existing in favor of the defendant against the assignor before notice of the assignment—Sec. 2546 of the Code of 1873 so providing and abrogating the rule of the text—and to the same effect is De Laval Separator Co. v. Sharpless, 134 Iowa 32, 111 N. W. 439, under Sec. 3461 of the Code of 1897.

MEFFERT v. DUBUQUE, B. & M. R. R. Co., 34 IOWA 430

1. **Fees—Witnesses—Witness Attending in More Than One Case—Court May Prescribe Rules as to Fees and Mileage.**—Under Sec. 2680 of the Code of 1860, the district court may prescribe the rule that a witness attending court in several cases can only claim witness fees and mileage in one case, which case the witness may select. pp. 431, 432.

Cited in Hardin v. Polk County, 39 Iowa 663, the court holds that under Sec. 3814 of the Code of 1873, one who is subpoenaed to attend court as a witness in several cases at the same time, can claim and be allowed witness fees and mileage in one of the cases.

FIRST NATIONAL BANK OF DUBUQUE v. CARPENTER, STIBBS & CO., 34 IOWA 433

(Later appeal, 41 Iowa 518.)

1. **Partnership—To What Extent Partner Can Bind Firm Action on Guaranty Made by Partner—Want of Authority—Effect—Burden of Proof.**—A partner can bind the partnership in relation to all matters connected with the business; and where the firm is sought to be made liable under a contract made by a partner the burden of proof is on the firm to show that the contract was made by the partner outside of the business and without authority. But a contract made by a partner outside of the business and without authority, binds him personally.

This rule applies in an action against a partnership on a contract of guaranty made by a member thereof, p. 436.

Cited in Brewster v. Reel, 74 Iowa 508, 38 N. W. 382, the court holding that a partner cannot pledge the firm credit, nor use the firm property, to secure or pay his individual debts; nor can one partner bind the firm by a transfer of its property to secure the debt of a co-partner without the latter's consent.

Cross reference. See further in this connection, annotations under Sternburg v. Callanan & Ingham (14 Iowa 251), Vol. II, p. 23.

HENDERSON, Gd'N., v. GREEN, 34 IOWA 437, 11 AM. REP. 149

1. **Wills—Construction of—Specific Devise, What Construed as.**—A devise of real estate is always to be regarded as specific whether the estate is specifically described, or only in general terms and by reference to other facts and documents, p. 439.

Unreported citation, 119 N. W. 716.

RAINBOLT v. EDDY, 34 IOWA 440, 11 AM. REP. 152

1. **Promissory Note—Material Alteration—Filling in of Blank—Action by Bona Fide Holder—Burden of Proof.**—Where after

the execution and delivery of a promissory note it is materially altered by filling in a blank with "ten per cent. inst.," it is valid and enforceable as altered against the maker, in favor of a *bona fide* indorsee, for value, and before maturity, unless the maker pleads and proves that the indorsee took with knowledge of the alteration, pp. 441, 442.

Distinguished and narrowed in Knoxville Nat'l Bank v. Clark, 51 Iowa 271, 1 N. W. 496, 33 Am. Rep. 129, holding that a forged negotiable instrument is unenforceable in whosoever hands it may come; and that where a negotiable note, not in blank, is materially altered after its execution and without the consent of the maker, such fact is a defense to an action thereon by a *bona fide* holder who obtained it before maturity and for value: Hence holding that where a negotiable note for "\$10 * * * * ten dollars" is so altered before indorsement to read, "\$110 * * * * one hundred and ten dollars," such alteration is a defense in an action thereon by a *bona fide* holder who obtained it for value and before maturity.

Impliedly overruled in Conger v. Crabtree, 88 Iowa 538-540, 45 Am. St. Rep. 249, 55 N. W. 336, holding that when after its execution and delivery, a blank in a promissory note is filled in, without the consent of the maker, so as to increase the liability of the maker (in this case inserting the rate of interest) it is a forgery and is void as between the maker and the payee who made the alteration: And that when in an action on such a promissory note the maker shows such an alteration in the note as will make it void as between him and the party who altered it, the burden of proof is upon the party asking a recovery thereon to establish the liability of the maker notwithstanding the alteration; as that the maker was guilty of negligence in delivering the note with the blank unfilled.

STATE v. STERLING, 34 IOWA 443

1. Criminal Law—Conspiracy—Elements of—Sufficiency of Indictment for.—An indictment for criminal conspiracy is good although it charges that the conspiracy consisted in an agreement to commit more than one crime. The gist of the crime of conspiracy is the agreement between two or more parties to commit an unlawful act or acts, pp. 444, 445.

Reaffirmed in State v. Kennedy, 63 Iowa 200, 18 N. W. 887; State v. Loser, 132 Iowa 422, 104 N. W. 338.

Unreported citation, 128 N. W. 346.

2. Criminal Conspiracy—Evidence—Circumstantial Evidence May Convict Persons Accused of.—Persons indicted for criminal conspiracy may be convicted upon circumstantial evidence alone, pp. 446, 447.

Reaffirmed in State v. Manning, 149 Iowa 209.

Reaffirmed and extended in Miller v. Dayton, 57 Iowa 428, 1 N. W. 817, holding further that the rule is equally applicable in a civil action for damages for death by a criminal conspiracy.

FISHER v. WISNER, 34 IOWA 447

1. Taxation and Revenue—Public Lands—Land Held under Military Land Warrant—Period Exempt from Taxation.—Land held by a veteran of the war of 1812 or his heirs under a military land warrant, is, under the Act of Congress of March 3, 1845, exempt from taxation for state purposes for three years from the time the patent issues, pp. 448-450.

Reaffirmed in Churchill v. Sowards, 78 Iowa 473, 43 N. W. 272

BARTHOL v. BLAKIN, 34 IOWA 452

1. Note and Mortgage—Verbal Assignment of—Action by Assignee.—A note and mortgage may be verbally assigned, and the assignee thereof may maintain an action thereon in his own name, 453.

Special cross reference. For cases citing and sustaining the text and many others on this question, see annotations under Rule 1 of Moore v. Lowrey (25 Iowa 336), ante. p. 274; Rule 2 of Conyngham v. Smith (16 Iowa 471), Vol. II, p. 458.

KING v. IOWA MIDLAND R. R. CO., 34 IOWA 458

1. Railroads—Condemnation of Land for Right of Way—Measure of Damages to Land Owner.—In a proceeding for the condemnation of land for a railroad right of way the land owner is to be compensated for the damages occasioned by the taking of the land therefor; but damages to the land owner which may thereafter be caused by independent acts or negligence of the railroad company in constructing the road-bed and for which an action will lie, are not to be allowed in such proceeding, p. 459.

Reaffirmed in Gear v. C. C. & D. R. R. Co., 43 Iowa 85; Miller v. Keokuk & Des Moines Ry. Co., 63 Iowa 685, 16 N. W. 567; Doucett v. Mason City & Ft. D. Ry. Co., 76 Iowa 440, 41 N. W. 66; Guiraud v. Iowa & St. L. R. R. Co., 125 Iowa 304, 101 N. W. 95; and 133 Iowa 681, 109 N. W. 209; Albright v. Cedar Rapids & Iowa City R. Co., 133 Iowa 645, 646, 110 N. W. 1053.

Reaffirmed and explained in Hunt v. Iowa Cent. Ry. Co., 80 Iowa 21, 41 Am. St. Rep. 473, 52 N. W. 670, holding that in a proceeding to condemn land for a railroad right of way, the land owner is to be compensated for the immediate consequences of the appropriation, and not for damages which may thereafter result from the negligent acts of the railroad company.

Reaffirmed and varied in *Bennett v. City of Marion*, 106 Iowa 634, 76 N. W. 846, holding that the rule is equally applicable in a proceeding to condemn land for sewer purposes.

Reaffirmed and qualified in *Cummins v. Des Moines & St. Louis Ry. Co.*, 63 Iowa 402, 19 N. W. 268, holding that in a proceeding for the condemnation of land for a railroad right of way, the land owner is entitled to compensation for any damages which will result to the portion of the premises not appropriated, from the proper construction and use of the railway: And holding that when the construction of the road-bed requires a cut to be made through the land, the damages to the land not taken by reason of the act is to be considered in estimating the damages in the condemnation proceeding.

Cross reference. See further on this question, annotations under *Fleming v. Ch. D. & M. R. R. Co.* (34 Iowa 353), ante. p. 891.

2. Railroads—Condemnation of Land for Railroad Right of Way—Damages—Evidence of—Value of Adjoining Tracts of Land, When Not Admissible.—In a proceeding for the condemnation of land for a railroad right of way, evidence of the value of adjoining tracts of land, or of the price paid by the railroad company for rights of way through adjoining tracts, is inadmissible to prove the value of the land sought to be taken, unless it is further shown that the adjoining land is of exactly the same character and value, pp. 461, 462.

Reaffirmed in *Cummings v. Des Moines & St. L. Ry. Co.*, 63 Iowa 404, 19 N. W. 269; *Simons v. Mason City & Ft. D. R. R. Co.*, 128 Iowa 150, 151, 103 N. W. 133; *Rauck v. City of Cedar Rapids*, 134 Iowa 574, 111 N. W. 1027 (this case being a proceeding to condemn land for a street and other public purposes of a city); *Watkins v. Wabash R. R. Co.*, 137 Iowa 442-444, 113 N. W. 925.

Cited in *Arnd v. Aylesworth*, 136 Iowa 300, 111 N. W. 407, turning on other questions.

Distinguished and narrowed in *Town of Cherokee v. S. C. I. F. Town Lot & Land Co.*, 52 Iowa 283, 284, 3 N. W. 43, holding that where in a condemnation proceeding a witness testifies to the value of adjoining and neighboring tracts of land and to the value of the land sought to be condemned, and then points out and compares the difference between them as to character, quality and value, such evidence is admissible on the question of the value of the land sought to be taken.

(Note.—This Town of Cherokee case is criticised in several of the cases above, which reaffirm the rule.—Ed.)

WAMSLEY v. RIVERS, 34 IOWA 463

1. Negotiable Note—Protest—Notice to Indorser—Sufficiency of Notary's Certificate to Establish.—Where a notary's certificate states that he (the notary) notified the indorser of a negotiable note

of demand on the maker and his refusal to pay, by notice in writing duly mailed by him addressed to the indorser at a specified town or city, it is *prima facie* evidence that such town or city was the residence of the indorser and is sufficient to authorize a recovery in an action by the holder against the indorser, unless the latter rebuts and overcomes the evidence by proof, pp. 464, 465.

Reaffirmed in Fuller & Warren v. Dingman, 41 Iowa 508.

McDUNN v. CITY OF DES MOINES, 34 IOWA 467

(Later appeal, 39 Iowa 287.)

1. Municipal Corporations—Dedication of Street by Record Plat—Effect.—Where the owner of land dedicates a street to the use of a city by a plat which is acknowledged and recorded as provided by the Code of 1860, the fee simple title to the street vests in the city for the use of the public, p. 470.

Reaffirmed in Lake City v. Fulkerson, 122 Iowa 571, 98 N. W. 377, the case, however, turning on another point.

2. Lands—Adverse Possession—What Necessary to—Color of Title or Claim of Right.—In order for one to rely on adverse possession of land he must hold possession for the statutory period of ten years under color of title or claim of right, p. 471.

Reaffirmed in Solberg v. City of Decorah, 41 Iowa 505.

Cross reference. See further on this question, annotations under Grube v. Wells (34 Iowa 148), ante. p. 865.

BREWER v. HOLBORN, 34 IOWA 473

1. Judgment—Vacation of—Petition for—Allegations—Proof Required.—In order for one to obtain a vacation of a judgment under Sec. 3499 of the Code of 1860, for fraud practiced by the successful party, or for unavoidable casualty or misfortune preventing him from prosecuting or defending, he must aver and prove the exercise of due diligence on his part, as well as the existence of a cause of action or defense, p. 474.

Reaffirmed in Bank of Stratton v. Dixon, 105 Iowa 150, 74 N. W. 920, under Sec. 3159 of the Code of 1873, corresponding to the text.

Reaffirmed in Dryden v. Wyllis, 51 Iowa 535, 1 N. W. 704, holding that—under Sec. 3159 of the Code of 1873—a judgment against a defendant will not be vacated on motion or petition until it is judged that there is a valid defense to the action in which the judgment is rendered.

Reaffirmed in Reintz v. Engle, 130 Iowa 728, 107 N. W. 100, holding that—under Sec. 4049 of the Code of 1897—a judgment which is merely voidable or irregular, is not to be vacated until after a full trial.

Unreported citation, 124 N. W. 360.
(Note.—There are other cases sustaining, but not citing the text.
—Ed.)

STAHL v. ROOST, 34 IOWA 475

1. Judgment Lien on Land—Limitation of—Levy and Sale of Land under Execution after Judgment Lien Is Barred.—Under Sec. 4109 of the Code of 1860, a judgment lien on land is barred after ten years from its rendition. But under Sec. 2740 of the Code of 1860, a judgment is in force and is not barred until the lapse of twenty years from its rendition; and under Sec. 3246 of that Code execution may issue at any time until the judgment is barred.

So where an execution is issued and levied on land after the expiration of ten years but before the expiration of twenty years from the date a judgment was rendered, the judgment creditor has a lien on the land from the date of the levy, and a sale thereunder passes the title to the execution sale purchaser, pp. 476, 477.

Reaffirmed in Hawkeye Ins. Co. v. Maxwell, 119 Iowa 674, 675, 94 N. W. 208; *Mudge v. Livermore*, 148 Iowa 474, 475, 123 N. W. 200.

MOSIER v. VINCENT, 34 IOWA 478

(Later appeal, 39 Iowa 607.)

1. Highways—Proof to Establish—Dedication and Prescriptive Use.—A highway may be established by record evidence, by proof of a dedication, or by proof of a prescriptive use by the public, pp. 479, 480.

Reaffirmed in Baldwin v. Herbst, 54 Iowa 169, 6 N. W. 257.

Reaffirmed and explained in Snouffer v. C. R. & M. City Ry. Co., 118 Iowa 296, 297, 92 N. W. 83, holding that dedication of realty to public use may be accomplished without any deed or formal act by the dedicator, and without any formal declaration of acceptance by the public authorities; and the dedication may be shown by the verbal declarations of the owner, by his act in filing the plat, by his silence in the face of known adverse possession by the public, or by any other act or omission from which the intention to dedicate may fairly be inferred; while the acceptance thereof may, also, be inferred from general use of the road or way by the public, or by the improvement and repair thereof by the authorities having care and control of the highways.

Reaffirmed and explained in State v. Birmingham, 74 Iowa 410, 411, 38 N. W. 123, holding that to constitute a highway by prescription, the road must have been occupied and used by the public under a claim of right to it as a highway, with the knowledge of the owner of the land for a period of more than ten years: But the dedication may be shown by writing, by declaration, or by conduct of the land owner; and if he knows for a series of years that the public is using

and treating a road as a highway, expending funds on its improvement and he acquiesces therein, this is evidence of an actual dedication.

Cross references. See further on this question, annotations under *Manderschid v. City of Dubuque* (29 Iowa 73), ante. p. 499; *Onstott v. Murray* (22 Iowa 457), ante. p. 56.

2. Highways—Power of Road Supervisors—Removal of Fence by, When Allowed.—Under Sec. 905 of the Code of 1860, a road supervisor cannot remove a fence which is within the limits or line of an established highway but which does not directly obstruct travel without giving the owner of the land who built the fence reasonable notice to remove it. And this applies whether the fence was built before or after the highway was established and opened, pp. 480-482.

Reaffirmed in *Blackburn v. Powers*, 40 Iowa 683-685.

3. Highways Authority of Road Supervisor—How Conferred—The authority of a road supervisor to work and exercise supervision over highways is conferred by statute, and is not dependent upon his being furnished with a map of the roads in his district as provided by Secs. 889, 890 of the Code of 1860. Such map is in no respect a process conferring any authority, but is intended to aid the supervisor to know and determine the highways in his district, p. 482.

Reaffirmed in *Campbell v. Kennedy*, 34 Iowa 496.

4. Appeal—Improper Questions Asked Witness on Trial—When Not Cause for Reversal.—The fact that improper questions were asked a witness upon the trial, will not be cause for reversal when the record upon appeal does not disclose the answers thereto and show that the answers were incompetent as evidence and prejudicial to appellant, p. 480.

Reaffirmed and explained in *Jenks v. Knott's Mexican Silver Mining Co.*, 58 Iowa 552, 12 N. W. 590, holding that in order to determine whether prejudice resulted to a party by reason of the exclusion of evidence, the answers, or the facts that they tend to establish should appear in the record upon appeal; and unless prejudice be thus shown by the exclusion of the evidence, the Supreme Court cannot disturb the judgment for such a reason.

Distinguished in *Quinlan v. C. R. I. & P. Ry. Co.*, 113 Iowa 96, 84 N. W. 962, holding that where questions asked a witness call for evidence which it is apparent is material and competent, it is reversible error for the trial court to refuse to allow him to answer them.

HEWITT v. EGBERT, 34 IOWA 485

1. Practice—Trial—Jury Trial in Action at Law—Waiver of Right to.—The referring of an action at law to a referee by consent of parties waives the right to a trial by jury, p. 487.

Reaffirmed in *In re assignment of* *Hooker & Son*, 75 Iowa 38, 39 N. W. 654.

1. Actions—Defective Original Notice—Judgment on—How Attacked.—Where an original notice is defective but not to such an extent as to amount to *no notice*, a judgment rendered thereon is not void and subject to direct attack in an independent action; but such judgment must be set aside by motion in the court rendering it as allowed by Sec. 3545 of the Code of 1860, or by reversal upon appeal, pp. 490, 491.

Reaffirmed in York v. Boardman, 40 Iowa 60, 61; Irions v. Keystone Mfg. Co., 61 Iowa 407, 408, 16 N. W. 350; Griffith v. Milwaukee Harvester Co., 92 Iowa 641, 54 Am. St. Rep. 573, 61 N. W. 246.

Reaffirmed and extended in Day v. Goodwin, 104 Iowa 380, 381, 65 Am. St. Rep. 465, 73 N. W. 866, holding further that the rule is equally applicable to a defective notice in an action against an insane person where a guardian *ad litem* is appointed and defends for the defendant.

Cross reference. See further on this question, annotations and cross references under Rule 1 of Newcomb v. Dewey (27 Iowa 381), ante. p. 413.

CAMPBELL v. KENNEDY, 34 IOWA 494

1. Highways—Authority of Road Supervisor—How Conferred.—The authority of a road supervisor to work and exercise supervision over highways is conferred by statute, and is not dependent upon his being furnished with a map of the roads in his district as provided by Secs. 889, 890 of the Code of 1860. Such map is in no respect a process conferring any authority, but is intended to aid the supervisor to know and determine the highways in his district, p. 496.

Reaffirmed in Mosier v. Vincent, 34 Iowa 482.

MILLER v. HAYES, 34 IOWA 496, 11 AM. REP. 154

1. Breach of Promise of Marriage—Action for—Evidence—Change of Feelings of Plaintiff.—In an action for damages for breach of promise of marriage, statements or conversations of the plaintiff made or had after the commencement of the action, showing her want of affection for or change of feelings toward the defendant, are inadmissible in evidence on behalf of the defendant, pp. 497, 498.

Reaffirmed, explained and qualified in Robinson v. Craver, 88 Iowa 388, 389, 55 N. W. 494; Edwards v. Edwards, 93 Iowa 130, 61 N. W. 414, holding that in an action for breach of promise of marriage statements of the plaintiff showing her change of feelings, want of affection or hostility for or toward the defendant after the alleged time of his breach or refusal to marry are inadmissible; but statements

Reaffirmed and explained in Keyser v. K. C. St. J. & C. B. R. R. Co., 56 Iowa 208, 209, 9 N. W. 133, holding that in an action against a railroad company to recover double damages for the killing of stock, under Sec. 1289 of the Code of 1873 (the law of the Rule), by a train, the burden of proof is on the plaintiff to show that the killing was done at a place where the defendant had a right to but did not fence; and that a railroad company is not required to fence depot grounds.

Cited in Case v. Ill. Cent. R. R. Co., 38 Iowa 582, 583; Kuhn v. C. R. I. & P. R. R. Co., 42 Iowa 423, the court holding that a railroad company is liable for negligently killing stock by its train at a public crossing.

Cited in Connyers v. Sioux City & Pac. Ry. Co., 78 Iowa 414, 415, 43 N. W. 269, the court holding that a railroad company is not liable for killing stock at a public crossing, unless it is done by reason of its negligence.

Cross reference. See further on this question, annotations under Comstock v. Des Moines Valley R. R. Co. (32 Iowa 376), ante. p. 755; Davis v. B. & M. Riv. R. R. Co. (26 Iowa 549)), ante. p. 361.

BOYNTON v. DISTRICT TOWNSHIP OF NEWTON, 34 IOWA 510

1. School Districts—Judgment Creditors of—Mandamus to Compel Levy of Tax to Satisfy Judgment.—Mandamus lies to compel the directors of a school district township to levy a tax to satisfy a judgment against the school district (under Secs. 3274, 3275, 2095 of the Code of 1860, and Sec. 79, Chap. 172 Acts of 1862), pp. 514-517.

Reaffirmed in Stevenson and Rice v. Dist. Township of Summit, 35 Iowa 472.

Reaffirmed and qualified in Dist. Township of Clay v. Independent Dist. of Buchanan, 63 Iowa 189, 190, 18 N. W. 860, holding that the rule only applies under Sec. 3049 of the Code of 1873, in favor of a judgment creditor of a public corporation (municipal corporation) who has either elected not to issue execution, or, having issued execution had been unable to find property upon which to levy.

Cross reference. See further on this question, annotations under Oswald v. Thedinga (17 Iowa 13), Vol. II, p. 481; Coy v. City Council of Lyons City (17 Iowa 1), Vol. II, p. 479.

BARTHELL v. RODERICK, 34 IOWA 517

1. Judgment—Correction of Mistake in by Action in Equity, When Allowed.—A mistake in a judgment may be corrected by an action in equity, when it is discovered too late to be corrected by motion and appeal as allowed by statute, even though the judgment may have been satisfied, unless the mistake was caused by the negligence of the party seeking the correction, or of his attorney.

Cited in Blodgett v. McVey, 131 Iowa 554, 108 N. W. 240, turning on another question.

Distinguished in State v. Wilson, 109 Iowa 95, 80 N. W. 230, holding that a prosecution for a violation of an ordinance of the city of Cedar Rapids may (under Sec. 34, Chap. 16, Acts of the Extra Session of the Fifth General Assembly (1856) which is that city's special charter) be in the name of the state.

a. **"Process" Defined.**—Process is so denominated, because it *proceeds* or issues forth in order to bring the defendant into court, to answer the charge preferred, and signifies the writ or judicial means by which he is brought to answer, p. 527.

Reaffirmed in Raheer v. Raheer, 150 Iowa 525, 129 N. W. 499.

YORK v. YORK, 34 IOWA 530

1. **Divorce and Alimony—Temporary Alimony—Fact of Marriage to be Shown.**—Alimony is a right that results from the marital relation, and the fact of marriage between the parties must be admitted or proved before there can be a decree for it even *pendente lite*, p. 532.

Reaffirmed in Smith v. Smith, 61 Iowa 140, 15 N. W. 686.

Reaffirmed and explained in Shaw v. Shaw, 92 Iowa 725, 61 N. W. 369, holding that as a general rule, the allowance of alimony either temporary or permanent, is based upon the existence of the marital relation; and if such relation is not admitted or established by satisfactory evidence, there can be no allowance made; but that upon the question of allowing temporary alimony the court has the power, from the pleadings, affidavits, and other proofs presented to it, to pass upon the question for the purposes of the application, and is not bound by the allegations of the petition and the denials of the answer, if other proofs submitted to him make out a fair presumption of the fact of the existence of the marriage relation.

Reaffirmed and varied in Wilson v. Wilson, 49 Iowa 545, 546, holding that in an action to set aside a decree of divorce for fraud, which is valid on its face, no temporary alimony and suit money can be allowed to the wife.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

CONWAY v. NICOL, 34 IOWA 533

1. **Criminal Conversation—Action for—Evidence.**—In an action for criminal conversation with the wife of plaintiff, the plaintiff must recover upon proof of seduction of his wife or adulterous intercourse between her and defendant had within the statutory period of limitation for bringing the action; but evidence of adultery committed by the wife and defendant prior to that time is competent to corrob-

rate and support evidence of the seduction or adulterous acts within such statutory period, pp. 534, 535.

Reaffirmed in Stumm v. Hummel, 39 Iowa 481.

2. Trial—Evidence—Witnesses—Impeachment by Contradictory Statements—Ground to be Laid.—Before a witness, even though he be a party, may be impeached by proof of prior contradictory statements, his attention must be directed to them, together with the time, place and person when, where and to whom they were made while he is testifying, p. 536.

Reaffirmed in Browning v. Gosnell, 91 Iowa 452, 453, 59 N. W. 342.

(Note.—There are other cases sustaining, but not citing the text.—Ed.)

3. Criminal Conversation—Action for—Evidence in Mitigation of Damages—Unchaste Character of Wife before Her Marriage, etc.—In an action for criminal conversation, proof of the wife's unchaste character or conduct prior to her marriage is admissible in mitigation of damages, p. 536.

Reaffirmed, explained and qualified in Frank v. Berry, 128 Iowa 225, 226, 103 N. W. 359, holding that the rule is applicable in an action by a husband for the alienation of his wife's affections; but before such evidence is admissible in mitigation of damages, it must be shown under the Code of 1897—be specially pleaded.

PRESNALL v. HERBERT, SHERIFF, 34 IOWA 539

1. Appeal—Review of Errors of Law—Motion for New Trial Below, Not Required.—Under Chap. 49, Acts of 1866, errors of law occurring upon a jury trial and excepted to at the time they were made, by the party complaining, may be reviewed upon appeal to the Supreme Court, although not made ground for a motion for a new trial below; and this rule applies to errors of the trial court in admitting or excluding evidence, and in giving or refusing instructions, p. 540.

Reaffirmed in Drefahl v. Tuttle, 42 Iowa 181, 182; Hunt v. Iowa Cent. R. R. Co., 86 Iowa 18, 41 Am. St. Rep. 473, 52 N. W. 669.

Reaffirmed and explained in Brown v. Rose, 55 Iowa 736, 737, 134 N. W. 134, holding that under Sec. 3169 of the Code of 1873, being § 1 of the law of the text, rulings of the trial court upon questions of law made during the course of a jury trial, and excepted to at the time, will be reviewed by the Supreme Court upon appeal, although no motion for a new trial was made below: And holding further that under Sec. 3168 of the Code of 1860, providing that a judgment or order shall not be reversed for an error which can be corrected by a motion in an inferior court, until such motion has been made there

overruled, applies only to such error as, without such motion, would not be called to the attention of the court below.

Reaffirmed and explained in Ellis v. Leonard, 107 Iowa 490, 78 N. W. 247, holding that Sec. 3169 of the Code of 1873, expressly provides that the Supreme Court, on appeal, may review and reverse any judgment or order of the Superior or District Court, although no motion for new trial was made in such court; but that this pre-supposes an exception properly taken below.

2. Husband and Wife—Wife's Personal Property in Possession or under Control of Husband—Liability for His Debts.—Personal property of the wife which is in possession of or under the control of her husband is subject to the satisfaction of his debts created after the property came into his possession or under his control and before the wife filed notice of her ownership as provided by Sec. 2502 of the Code of 1860, p. 543.

Reaffirmed and qualified in Miller & Co. v. Steele, 39 Iowa 530, holding that where a wife suffers her personal property to pass into the possession and under the control of her husband without filing with the recorder of deeds the notice of her ownership as provided by statute, it is liable to be taken in execution for the claim of one who gave credit to the husband while it was in his possession and who had no notice of the wife's title thereto.

Cross reference. See further on this question, annotations under Smith v. Hewitt (13 Iowa 94), Vol. II, p. 123.

STATE v. SCHAUNHURST, 34 IOWA 547

1. Evidence—Marriage—Record Evidence of.—Under Sec. 2528 of the Code of 1860, an entry of the fact of a marriage in the proper register of marriages, kept by the clerk of the circuit court, is sufficient proof of a marriage between the parties named therein, in the absence of proof showing that no such marriage in fact took place, p. 549.

Reaffirmed in State v. Matlock, 70 Iowa 230, 30 N. W. 495, under Sec. 2197 of the Code of 1873.

2. Incest—Evidence—Relationship—Acts and Declarations of Defendants Sufficient to Establish.—Upon the trial of an indictment for incest against a brother and sister, the fact of the relationship may be established by the acts and declarations of the defendant, p. 550.

Reaffirmed in State v. Jidd, 132 Iowa 299, 11 Am. & Eng. Ann. Cas., 91, 109 N. W. 893.

GETCHELL & TICHENOR v. ALLEN, 34 IOWA 559

1. Mechanic's and Materialman's Lien—Rights of Prior Mortgagee of Land—Repair or Improvement of Building on—Sec. 1855 of the Code of 1860, Construed.—Under Sec. 1853 of the Code of

lien against an independent building a priority of right in every case where the court shall find as a fact that such building can be removed without material injury to the security of the earlier lienholder; but where no such finding is made, the land must be sold, and the purchase price applied first in payment of the prior incumbrance.

CLEMENT v. PERRY, 34 IOWA 564

1. Lands—Adverse Possession of Wild, Unclosed or Uncultivated Land—Sufficiency of.—Where a person claims the title to land which is wild, unclosed, or uncultivated, and exercises the acts of ownership over it to which it is adapted, for the statutory period of ten years, it constitutes adverse possession, p. 567.

Special cross reference. For cases citing and sustaining the text, and others on the question, see annotations under Booth & Graham v. Small (25 Iowa 177), ante. p. 254.

Cross reference. See further on this question, annotations under Close v. Sam (27 Iowa 503), ante. p. 428.

SIMPSON v. CITY OF KEOKUK, 34 IOWA 568

1. Municipal Corporations—Negligent Improvement of Streets—Action by Abutting Lot Owner—Damages Preventable by Plaintiff, When Not Recoverable.—In an action by an abutting lot owner against a city for its negligence in constructing gutters and drains in a street, the plaintiff cannot recover damages which he could have prevented by the use of ordinary efforts and at a moderate expense, p. 569.

Reaffirmed in Bartle v. City of Des Moines, 38 Iowa 417; Van Pelt v. City of Davenport, 42 Iowa 314, 20 Am. Rep. 622; Hoehl v. City of Muscatine, 57 Iowa 451, 452, 10 N. W. 834.

Reaffirmed in Smith v. Ch., Clinton & Dubuque R. R. Co., 38 Iowa 522; Little v. McGuire, 38 Iowa 562, 563; Finch v. Central R. R. of Iowa, 42 Iowa 307, holding the rule applicable in actions for tort or negligence resulting in injury to or destruction of property.

Reaffirmed and explained in Freburg v. City of Davenport, 63 Iowa 122, 123, 50 Am. Rep. 737, 18 N. W. 707, holding that a city has the right to grade its streets; and it is not liable in damages for failure to provide culverts, or gutters adequate to keep surface water from adjoining lots which are below the established grade of a street—"particularly," says the court, "if the injury would not have occurred had the lots been filled up, so as to have been on a level with the street."

Reaffirmed and explained in Copper v. Dolvin, 68 Iowa 762, 56 Am. Rep. 872, 28 N. W. 61, holding that the rule does not apply where injury to property from the negligence or tort of defendant, can only be prevented by extraordinary diligence and more than a moderate expenditure of money by plaintiff.

Reaffirmed and varied in Hensen v. Beebe, 111 Iowa 536, 82 N. W. 942, holding that the rule is equally applicable in an action for breach of contract.

Cross reference. See further on this question, annotations under Mather v. Butler County (28 Iowa 253), ante. p. 451.

GREENE, ROWLEY & CO. v. WOODS, 34 IOWA 573

(Abstract.)

1. Action at Law—Pleading—Interrogatories Attached to Pleading—What Subject of—Practice.—In an action at law a party may, under Secs. 2985 and 2991 of the Code of 1860—attach to his pleading, interrogatories to be answered under oath by the adverse party, when the questions are pertinent to the issue, and when the pleading and interrogatories are accompanied by the affidavit of the pleader that he verily believes the subject thereof, or some of them, are within the personal knowledge of the adverse party, p. 574.

Reaffirmed in McFarland v. City of Muscatine, 98 Iowa 201, 66 N. W. 234, under Sec. 2693 of the Code of 1873.

BROWN v. SCOTT, 34 IOWA 575

(Abstract.)

1. Written Instruments—Failure to Affix United States Revenue Stamp—Effect—Evidence.—Failure to affix a United States Revenue Stamp to a written instrument as required by the act of Congress of 1864, does not render the instrument invalid, or inadmissible in evidence, unless the stamp was omitted with intent to evade the law and defraud the Government, p. 576.

Special cross reference. For cases citing and sustaining the text and many others, see annotations under Rule 2 of Mitchell v. Hon. Ins. Co. (32 Iowa 421), ante. p. 760.

STATE v. FOLSOM, 34 IOWA 583

(Abstract.)

1. Contempt—Sufficiency of Record—Certiorari.—Where (under Secs. 2694, 2695 of the Code of 1860) contempt proceedings do not state the evidence or the facts upon which the order finding for contempt is founded, and the warrant of commitment does not state the facts, or whether they were within the knowledge of the court or proved by witnesses, *Certiorari* will lie from the Supreme Court in favor of the person fined, pp. 583, 584.

Reaffirmed in State ex rel. Arthaud, 124 Iowa 189, 190, 99 N. W. 713; Drady v. Given, 126 Iowa 350, 351, 102 N. W. 117, under Sec. 4466 of the Code of 1897.

Reaffirmed, explained and qualified in Lutz v. Aylesworth, 6 Iowa 632, 633, 24 N. W. 246, holding that where a witness is fined

for contempt in refusing to answer a question propounded, and the notes of the stenographic reporter is afterwards transcribed, filed and preserved, it is a sufficient compliance with Sec. 3497 of the Code of 1873, requiring a statement of facts on which the commitment is founded to be preserved.

Cross reference. See further on this question, annotations under *State v. Dougherty* (32 Iowa 261), ante. p. 739.

JONES v. CLARK, 34 IOWA 590

(Abstract.)

(Former appeals 31 Iowa 497; 28 Iowa 593;

Later appeal, 37 Iowa 587.)

1. Appeal—Equity Cause—Reversal—Amendment after Cause Remanded.—Where upon appeal in an equity action the Supreme Court decides that appellant is the owner of personal property involved in the action, and the cause is remanded, the appellant is entitled to then amend his pleading claiming that the adverse party has converted the property and asking judgment for the value thereof, p. 591.

Distinguished in *Reed v. Howe*, 44 Iowa 302, 303, holding that a party cannot upon a reversal of a decree in an equity action and after trial *de novo* in the Supreme Court amend his pleading setting up a cause of action or defense which existed in his favor before the first trial below, and which he did not then put in issue.

Cross reference. See further on this question, annotations under *Jones v. Clark* (31 Iowa 497), ante. p. 700.

BERRY v. DAVIS, 34 IOWA 594

(Abstract.)

1. Attorney and Client—Action by Attorney for Value of Services Rendered in Litigation—Evidence.—In an action by an attorney for services rendered by him in a litigation, the evidence as to the nature and subject-matter thereof, and the effect of the services and benefits derived by the client, is admissible on the question of the value of the services, pp. 594, 595.

Reaffirmed, explained and extended in *Clark v. Ellsworth*, 104 Iowa 449, 450, 73 N. W. 1025, holding that in an action by an attorney to recover the value of services rendered, the importance of the litigation, the success attained, and the benefit which it secured may be considered in estimating the value thereof: And holding, also, that where, in such case the subject-matter of the litigation is of great importance to the litigants, and of a character to lead them to use every legitimate effort to succeed, the wealth of a party and his consequent ability to make a severe contest, may be considered in connection with his disposition to do so, as tending to show the import-

ance and value of the services which the attorney, for whose compensation he was responsible, was required to render.

Reaffirmed, explained and extended in Graham v. Dubuque Specialty Machine Works, 138 Iowa 463, 464, 15 L. R. A. (New Series) 729, 114 N. W. 622, holding that in an action by an attorney for the value of services rendered, the jury, or court, if tried without a jury, in estimating the value thereof, may take into consideration the time necessarily employed in and the result of the litigation, the amount therein involved and recovered, together with the learning and experience of the attorney, and his standing in the profession.

COURS v. HANNA, 34 IOWA 597

(Abstract.)

1. Fraudulent Conveyances—Voluntary Conveyance by Husband to Wife, When Not Fraudulent.—A voluntary conveyance of land by a husband to his wife will not be adjudged fraudulent as against creditors of the grantor, husband, when it appears that at the time of the execution of the conveyance, the husband had other property sufficient to satisfy his debts, p. 598.

Reaffirmed in Everist v. Pierce, 107 Iowa 45, 77 N. W. 508.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations and cross references under Lyman v. Cessford (15 Iowa 229), Vol. II, p. 330.

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